

# AMERICAN BAR ASSOCIATION JOURNAL

MARCH, 1930

## The World Court as a Going Concern

By CHARLES EVANS HUGHES

## Liability of Physicians for Sterilization Operations

By JUSTIN MILLER and DEAN GORDON

## Common Sense Versus Profundity in Judicial Decisions

By JOHN EVARTS TRACY

## Law Schools Today and Tomorrow

By H. C. HORACK

## Restatement of the Law of Property

By RICHARD R. POWELL

## Special Verdict as Aid to Jury in Civil Cases

By JOHN W. STATON

## Review of Recent Supreme Court Decisions

By EDGAR BRONSON TOLMAN

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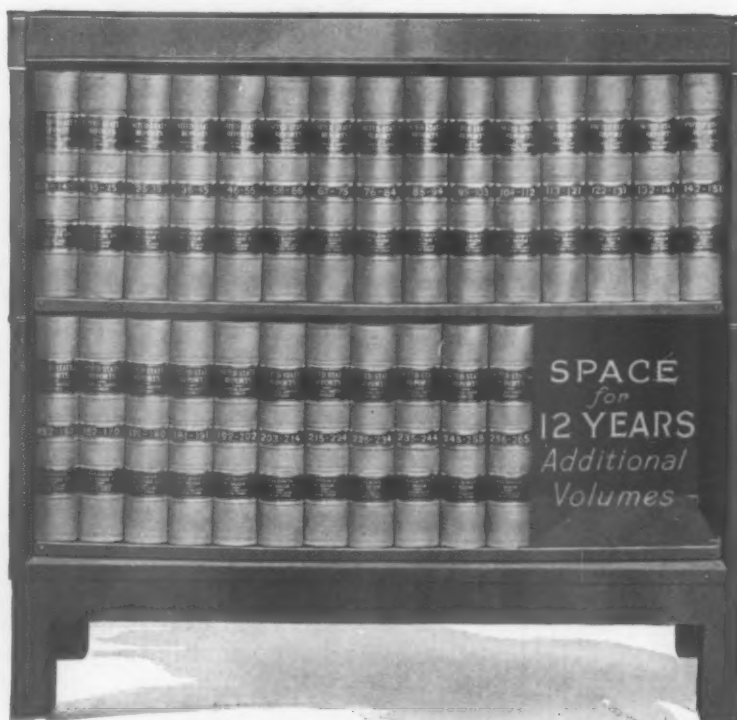
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VOL. XVI

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## *New York Court Punishes Ambulance Chasers*

SEVEN members of the New York bar were suspended and one censured by the Appellate Division recently, for the solicitation of negligence cases, in the first decisions to be returned in the "ambulance-chasing" investigation started two years ago by the Bar Association of the City of New York and the New York and Bronx County Bar Associations. In eighteen cases decided by the court, charges against ten lawyers were dismissed because not sustained by the evidence; two lawyers were suspended for two years each; five were suspended for one year each; and one was censured.

The Appellate Division also took action against two other lawyers, on other than ambulance chasing charges. One was disbarred for forging a clerk's name to a mortgage satisfaction piece, later testifying on the clerk's application for admission to the bar that the clerk signed it himself. Another was suspended for two years for failing to pay promptly money due a client.

## *Manufacturers Adopt Code of Ethics*

A MANUFACTURERS' Code of Ethics, setting forth in plain business man's language certain interpretations of the Clayton Act and the Federal Trade Commission Act which are now legally binding upon manufacturers in consequence of decisions of the courts and of the Federal Trade Commission, has recently been adopted by the members of the Jute Twine Institute of New York City, comprising the manufacturers of eighty per cent or more of all the jute twine manufactured in the country. Similar codes have been adopted by the Sugar Institute, the American Petroleum In-

stitute, the Anthracite Institute, and by institutes, trade associations and trade conferences in scores of other industries.

An Unfair Competition Bureau has also been set up by the Jute Twine Institute, under the charge of its legal counsel, to investigate all complaints charging unfair methods of competition on the part of anyone in the industry, whether a member of the Institute or not. The bureau will function similarly to other enforcement bodies recently set up in other industries. Where the circumstances require it, the bureau will lay instances of unfair competition before the Federal Trade Commission or the Department of Justice.

The Institute's Code of Ethics condemns as unfair competition the making of false or disparaging statements with respect to a competitor's business methods or products, the offering of lower prices or better terms to induce the breach of a contract, misrepresentation as to the quality of goods, the granting of secret rebates or concessions to any buyer, and the selling of goods below cost, to cut competition.

## *Nebraska Act to Reimburse Depositors of Banks Held Void*

THE Nebraska act appropriating about \$260,000 to pay depositors for losses incurred under the State Guaranty Fund plan was declared unconstitutional by the District Court of Lancaster County, Nebraska, in an opinion rendered January 4, according to the United States Daily of Jan. 5. The case will be appealed to the State Supreme Court, Attorney General Sorensen has announced.

The grounds upon which the court held the statute void were first, that it violated the due

process clause, and was not for a public purpose; second, that the title of the act was defective; and third, that the appropriation involved the taking of the property of the public generally for the relief of private persons without obligation on the part of the State, either legal or moral.

The court declined to pass upon the question of distribution of the appropriation among depositors, and dismissed the suit brought by Governor Weaver.

### *Juvenile Courts Called Antidote for Crime*

**G**ANGSTERS and confirmed criminals would be eliminated or reduced to a negligible quantity if every community were provided with a well-equipped juvenile court, according to a statement of Charles L. Chute, general secretary of the National Probation Association, in the association's Bulletin.

Although all but two states of the Union have laws for juvenile courts, says Mr. Chute, there are still hundreds of cities and a majority of rural communities without juvenile courts or probation services. The juvenile courts in the country having complete facilities for the treatment of delinquency and crime are very few.

"Studies made of confirmed criminals," continues the statement, "show that in nearly all cases their delinquencies started in youth. If crime can be treated promptly and intelligently when it first appears, we shall have found the remedy for the so-called 'crime wave' in our country."

The National Probation Association, whose president is Hon. George W. Wickersham, has laid

down seven standards for progressive juvenile court work. They include: (1) a judge chosen for his special qualifications, particularly an understanding of social problems and of child psychology; (2) private, informal hearings; (3) authority to deal with parents and exclusive authority to deal with children needing court care; (4) experienced probation officers, trained in child welfare work; (5) a good record system with adequate clerical help; (6) facilities for physical examinations and for mental study of problem children; (7) a well-equipped detention home or good family boarding homes for the temporary care of children.

### *Senator Asks Opinion of New York Bar on World Court*

**T**HE action of the New York City Bar Association's committee on international law, unanimously recommending to the Senate that it ratify the protocol for American adherence to the World Court, has prompted Senator Vandenberg of Michigan, a member of the Senate Committee on Foreign Relations, to write the association, asking its opinion upon the legal effect of the proposed basis of American adherence. Three questions were submitted by the Senator, which, together with the association's answers, were made public by Senator Vandenberg and published in the United States Daily of Jan. 6. The questions and answers were as follows:

**Q.** Is it your conclusive judgment that the United States cannot be made a litigant in the World Court without the specific consent of the United States in each instance **A.** Yes.

**Q.** Is it your conclusive judgment that advisory opinions cannot be rendered by the court in a matter in which the United States has an interest except as the United States consents? **A.** Yes.

**Q.** Is it your conclusive opinion that the court is not calculated to render an advisory opinion over the protest of the United States in a case in which the United States claims an interest? **A.** Yes.

The committee on international law of the Association of the Bar of the City of New York includes Elihu Root, George W. Wickersham, Frederick R. Coudert, James W. Gerard, John G. Milburn and Frank L. Polk.

### *Kentucky Judicial Council Makes First Biennial Report*

**T**HE Judicial Council of Kentucky, established in 1928, has just submitted its first biennial report, setting forth a number of recommendations for improvement in Kentucky jurisprudence, and including also a detailed compilation of statistical reports of the work accomplished by the judicial system of the commonwealth.

The Council has proceeded cautiously in recommending measures, preferring gradual improvement to the inevitable confusion attendant upon numerous radical changes, however desirable. Therefore, the report states, a number of suggestions were laid aside for further consideration. Eleven measures are submitted by the Council, each designed to remedy some defect peculiar to local law.

One evil which has roused much popular interest in other parts of the country as well as in

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Kentucky is the practice of paying trial judges or justices of the peace a fee for each conviction, and no fee for acquittals. The Council's report says on this subject: "We have considered the problems ensuing from the respective decisions of the Supreme Court of the United States and of the Court of Appeals of Kentucky that a judge who will receive substantial fees if the defendant in a criminal case is convicted and nothing in the event of an acquittal, is disqualified to sit in the trial of the case. We recommend that the county judge be paid a salary by the county, to be fixed by the fiscal court within minimum and maximum limits, for his services in trying criminal cases and that all fees and commissions heretofore payable to him be paid into the county treasury."

An important recommendation is that the procedure in election contest cases be amended, so as to require a petition contesting a primary election to be filed within fifteen days after the primary, instead of within five days after the votes have been tabulated and the results ascertained. "Just when the commissioners ascertain the results," says the report, "is always a question of fact—often an extremely doubtful one. It has been an abundant source of contention, sometimes of injustice and even of fraud." The suggested amendment would eliminate this indefiniteness.

Other recommendations relate to the investment and management of property of persons under disability. One of these recommendations is that the proceeds of a sale of real property of such persons should be allowed to be reinvested in any properties or securities deemed lawful investments for fiduciary funds. "When the code was drawn," the report points out, "land was considered to be the only secure form of investment, with the possible exception of government bonds. Today, there are so many forms of lawful investments which offer an equal, if not greater, security that, in our opinion, the estates of persons under disability, and particularly of infants, are at a great disadvantage because of the legal obstacles in the way of investments of this kind."

The delays involved in appeals would be shortened by a measure which would permit a bill of exceptions and transcript of testimony to be filed and approved during court vacation, on a day appointed by the trial judge. This would make it possible to file the record in the Court of Appeals without waiting for the next term of the trial court, though the record was not ready during the term at which the case was tried.

#### *Meeting of Committee on Conservation of Mineral Resources*

THE Committee on Conservation of Mineral Resources of the Section of Mineral Law held a meeting in Chicago during the latter part of January. Chairman Chester I. Long presided. After a full discussion two sub-committees were appointed, one on proposed legislation relating to solid minerals and the other on conservation of oil and gas. Mr. William V. Hodges of Denver is chairman of the first sub-committee and Mr. W. L. Murphy of Missoula, Mont., and Mr. D. J. F. Strother of

Welch, W. Va., are the other members. The second sub-committee is composed of Walter F. Dodd of Yale University, chairman; J. C. Denton of Tulsa, Okla.; Paul M. Gregg of Los Angeles, Cal.; T. L. Foster of Dallas, Tex., and Earle W. Evans of Wichita, Kan.

These sub-committees are to consider the subjects assigned and report to a full meeting of the committee to be held early in the spring. The sub-committee on oil and gas will recommend legislation for the oil-producing states. It will also give consideration to the act which California has passed for the conservation of natural gas. Pending legislative proposals, both for congressional and state action, will be considered by these two bodies.

The following members of the committee were present at the meeting: Chester I. Long, chairman; Walter F. Dodd, J. C. Denton, W. L. Murphy, T. L. Foster, William V. Hodges, D. J. F. Strother. In addition, Mr. James A. Veasey, chairman of the section of Mineral Law, and the following members of the Council of the section were in attendance: Mr. Alvin Richards, Mr. James H. Finley and Mr. P. C. Spencer.

#### *Buncombe County (N. C.) Bar Entertains Executive Committee*

THE Buncombe (N. C.) County Bar was host at a banquet to the Executive Committee of the American Bar Association during its meeting at Asheville in January. Mr. Kinsland Van Winkle, President of the Buncombe Bar, acted as toastmaster and his introductions of the speakers were extremely humorous and provoked much merriment. President Kenneth C. Royall, of the North Carolina Bar Association, welcomed the guests and President Henry Upson Sims, of the American Bar Association, spoke very effectively of the ends and aims of the organization. Chief Justice Stacy, of the North Carolina Supreme Court, gave a new definition of law in his able address, declaring that Blackstone's view of the term was out of date and that today law should be defined as "the highest expression obtainable at any given time of the people's conception of the correct rule of conduct." Judge Webb, of the U. S. District Court spoke of the cordial relations between the Federal Bench and Bar, and Mr. Charles A. Boston, member of the Executive Committee, spoke in a humorous vein and rather surprised his hearers by his acquaintance with North Carolina history. Members of the Executive Committee present at the banquet were: President Henry Upson Sims; John H. Voorhees, of Sioux Falls, S. D., Treasurer; William P. McCracken, Jr., of Washington and New York, Secretary; Edgar B. Tolman, of Chicago, editor-in-chief of *The Journal*; Charles A. Boston, of New York; Province M. Pogue, of Cincinnati; Ralph A. Van Orsdel, of Omaha, Nebr.; Thomas W. Davis, of Wilmington, N. C.; Bruce W. Sanborn, of St. Paul; Guy A. Thompson, of St. Louis; William B. Greenough, of Providence, R. I.; Clarence E. Martin, of Martinsburg, W. Va., and Hon. Orie L. Phillips, of Albuquerque, N. M., Judge of U. S. Circuit Court of Appeals.

### Massachusetts Judicial Council Reports

THE Judicial Council created in 1924 for the continuous study of the Judicial System, its procedure and practice and its results, has filed its 5th annual report with Governor Allen. The report is signed by Addison L. Green of Holyoke, Chairman, Judge Franklin G. Fessenden of Greenfield, formerly of the Superior Court, Judge Charles T. Davis of the Land Court, Judge Harry R. Dow of the Essex County Probate Court, Judge Charles L. Hibbard of the Pittsfield District Court and Robert G. Dodge, Frederick W. Mansfield and Frank W. Grinnell of the Boston Bar.

The report, which is printed as Public Document No. 144 and may be obtained at the Public Document room at the State House, opens with a description of the congestion in the Superior Court due largely to the flood of motor vehicle accident cases which followed the motor vehicle insurance law. As that whole problem, including the recommendations made by the Council last year, was referred for further consideration to the Special Commission on Motor Vehicle Insurance created by the Legislature, the Council awaits the report of that commission and makes no further recommendation on the subject at this time.

The outstanding recommendation in the report of the Council is a "Plan for Measured Service and Compensation for Judges of Advancing Age" in the Superior Court, the Land Court and the Municipal Court of the City of Boston. This subject is more fully discussed and more carefully thought

out than it has been before and as there is much misunderstanding about it, we quote in full that part of the report. The subject is one of far-reaching importance which should be more generally understood.

### Plan for Measured Service and Compensation for Judges of Advancing Age

"We believe thoroughly in our constitutional system of appointment of judges with tenure 'during good behavior,' which has stood the test of a century and a half of practical experience; but, under the conditions of modern life, we think it needs to be supplemented in the manner herein-after suggested.

"A judge, as he grows older, is likely to feel the strain and not be physically equal to effective full-time service at a period when his judicial capacity and experience may still be of great value to the public. The growing public interest in more expeditious and businesslike administration of the courts has called attention to the situation. Many judges at the age of seventy years, and a few for some years thereafter, are still sufficiently vigorous for full-time service. The problem, then, is to retain the services of the judges according to their strength by providing an elastic system under which the amount of service required may be adjusted and their compensation measured by the service rendered.

"Reference was made to this problem in our third report in 1927, and again in our fourth report in 1928. This need has been felt and met in other states in various ways. Our study of the problem has been greatly helped by the information which we have received from officials in these states.

"We expressly disclaim at the outset any intention to create or extend a pension or retirement allowance scheme. Briefly stated we desire to accomplish one object only—to maintain the maximum working capacity of the courts, and to that end

"(a) To improve the conditions in our courts by adjusting the services of judges to advancing age while conserving to the Commonwealth the full measure of ability and experience of these judges as long as they are strong enough to serve.

"(b) To emphasize the importance and establish the place in our judicial system of the fifty-eighth amendment to our Constitution.<sup>1</sup>

"The constitutional tenure 'during good behavior' was established to encourage and protect judicial independence and impartiality and not to provide for a life tenure of office without effective and continued service. Judges hold office solely in accordance with the constitutional phrase 'during good behavior' which implies, of course, a continuance of the judicial service for which they are appointed. No judge has ever been appointed to his position 'for life.' They are removable by address of both houses for any reason, as Judge Bradbury was removed from the Supreme Judicial Court in 1803, for incurable illness. They are also removable 'after due notice and hearing' (unless hearing is waived) by the Governor and Council

<sup>1</sup>The 58th amendment provides "that the Governor with the consent of the Council, may after due notice and hearing retire them [judicial officers] because of advanced age or mental or physical disability. Such retirement shall be subject to any provisions made by law as to pensions or allowances payable to such officers upon their voluntary retirement."

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The Judicial Council of Massachusetts: From left to right: F. W. Grinnell, Judge Dow, R. G. Dodge, Judge Fessenden, A. L. Green, Chairman, Judge Davis, F. W. Mansfield, Judge Hibbard. The picture was taken at the meeting in Dec., 1920, when the Fifth Report was finished. Courtesy of Massachusetts Law Quarterly.

'because of advanced age or mental or physical disability' under the fifty-eighth amendment, which amendment has existed in the Constitution since 1919. The provisions of this amendment have been used but once. There is in our opinion no doubt of the constitutional power of the Legislature to enact such laws as will adjust the amount of service and compensation on a measured basis as we have above suggested.

"Accordingly we propose, as a measure of sound policy in the interest of economical and effective use of the judicial power, that a justice of the Superior Court, of the Land Court or of the Municipal Court of the City of Boston shall be given the option after fifteen years of judicial service as a full-time judge to be put, at his request, on a part-time basis of not less than half-time and be paid for that service a proportionate amount of the full salary; that at the age of seventy each judge of said courts be automatically placed on such half-time basis subject to a call to service for half-time or for more than half-time, if he is able and willing, by the chief justice of the Superior Court or the Municipal Court of the City of Boston or by the judge of the Land Court and that he be paid a proportionate amount of the full salary measured by the service rendered upon certificate of the chief justice or judge. This plan would not affect the judicial ten-

ure in the slightest degree. The part-time judge would still remain a judge in every respect with all the powers and duties of a judge except the duty of full-time service, and the compensation would be measured by that service. A judge of seventy years, or more, who was still vigorous enough for full-time service could still be called upon by the chief justice or judge for full-time. As a part of our scheme we recommend that in the Superior Court for every two justices thus put on a half-time basis a vacancy be created in the regular number of justices to be filled by a new appointment. In the other two courts mentioned, where the number of judges is much smaller, a vacancy should be created by each retirement.

"The situation in the Superior Court is such, so far as the volume of business is concerned, that there will always be work enough which can be done by such part-time judges. Among other things, by holding additional jury-waived sessions, they may obviate the necessity of a number of references to master or auditors, thus saving a part of what is now a heavy expense to the counties and litigants.

"The Land Court with a heavy docket has only three judges and the Municipal Court of the City of Boston with a chief justice, eight associate justices and four special justices and a large and in-

creasing volume of business will furnish abundant opportunity for service by regular justices and part-time justices as well.

"We believe that the plan above outlined is simple, practicable and constitutional and that it would improve the entire judicial system, preserve and prolong the valuable service of experienced judges, be more economical than the present arrangement, and that it would, at the same time, bring the fifty-eighth amendment into practical operation when necessary for the good of the service in a way which is desirable and expedient.

"The fifty-eighth amendment was intended to supplement the purpose of the twenty-ninth article of the Bill of Rights and of the third chapter of the Constitution and thereby to provide and maintain a vigorous, effective, independent and impartial judiciary.

"Under the plan which we propose, every judge upon reaching the age of seventy will automatically go on a measured service basis, and if thereafter he is unable to serve for half time in any one year that fact will readily become known and if his weakened condition appears to be sufficiently permanent the procedure for involuntary retirement under the fifty-eighth amendment can be brought into operation. The amendment was adopted for practical use under the circumstances which we are describing. . . .

"The District Courts present a more difficult problem. We have as yet found no satisfactory method whereby a justice of one of these courts can retire to part-time service. As the law now stands, a District Court judge who was appointed before July 1, 1921, and has reached the age of seventy years after twenty successive years of service may resign his office or be retired under the fifty-eighth amendment and thereafter receive three-fourths of the salary paid to the justice of his court immediately prior to January 1, 1924. A justice appointed after July 1, 1921, may be retired under the fifty-eighth amendment and thereafter receive one-half of the salary paid to him immediately prior to July 1, 1921. Should such a judge appointed after July 1, 1921, resign he would receive no pension or retirement allowance.

"We are informed that the ages of the District Court judges as of October 1, 1929, were: 1 below forty years of age; 12 from 40 to 49, inclusive; 17 from 50 to 59, inclusive; 23 from 60 to 69, inclusive; 15 from 70 to 79, inclusive; 4 from 80 to 86, inclusive. Since October 1, one of the judges in the last class has resigned.

"We shall continue our study of this problem for it is, in our opinion, of the greatest importance that there should be no failure of justice due to advanced age or mental or physical disability."

The report of the Council also deals with other matters, such as the need of more technical assistance in land registration, bills of exceptions, the admissibility in evidence of business entries, survival of actions and various suggestions as to civil and criminal proceedings in the district courts, including the more serious motor vehicle offenses. There is also a recommendation to avoid double trials in criminal cases in the Boston Municipal Court and to provide for the prompt review of sen-

tences by a board of review of three judges in that court.

There is a recommendation for a simpler and more direct method of proving claims in the Probate Court against the estate of a deceased person.

There are three other simple recommendations of general interest—one relating to the theft of bar examination papers which created a sensation a few years ago,—another relating to the comfort of witnesses and another relating to the treatment of juries. On the first of these subjects the Council reports as follows:

#### **Theft of Bar Examination Papers**

"The community was startled several years ago by the news that the contents of the examination papers for admission to the bar had been stolen in advance and sold to some of the candidates for admission. As a result of the discovery the Bar Examiners discarded the whole examination and required all the candidates for admission at that time to take a second examination. The matter was investigated by the then Attorney General and criminal proceedings were begun which after several years were reported to have been dropped for failure to obtain sufficient evidence to warrant proceeding with the cases. The difficulty appears to have been that the only form of criminal proceeding practically applicable to such a situation was a common law indictment for conspiracy to work a fraud upon the Commonwealth, and the difficulty of proving such a conspiracy beyond a reasonable doubt was the obstacle in the way of further prosecution of the cases. While we hope there will be no further occasion for such proceedings in the future, we do not think that the lack of effective procedure for dealing with such a situation should continue.

"General Laws, chapter 31, sections 11 and 51, provide a penalty for furnishing special or secret information in connection with civil service appointments. After conferring with former Assistant Attorney General Alfred R. Shrigley, who investigated the cases referred to, we recommend the following draft act:

"Chapter 221 of the General Laws is hereby amended by inserting after Section 37, the following new section:

"Section 37a. A person who shall wilfully or corruptly exhibit or disclose or obtain or distribute an examination paper or any question for admission to the bar, or copies thereof, or the contents or any part of the contents thereof, prior to the examination for which said paper or question has been prepared shall be punished by a fine of not less than ..... dollars, or by imprisonment for not more than ..... years, or by both fine and imprisonment.

#### **Chairman Wickersham Explains Commission's Recommendations**

CRITICS who have objected to the measures for improving prohibition enforcement recommended by the National Commission on Law Observance and Enforcement were answered by George W. Wickersham, Chairman of the Commission, in a radio address delivered Jan. 22 under the auspices of the National League of Women Voters and the National Broadcasting Company, and published in the United States Daily of January 24, 1930.

"At an early date in its deliberations," said Mr. Wickersham, "certain things appeared obvious to

the Commission, which, in its opinion, might without delay be recommended for the consideration of Congress as making for improvement in the enforcement of the prohibition law. Accordingly, in the month of November, the Commission sent to the President an interim or preliminary report." This report has since been submitted by the President to Congress, where it has been the subject of debate.

The recommendations contained in this report were, briefly: "(1) Transfer to the Department of Justice of the investigation and preparation of cases involving violations of the law; (2) codification into succinct and clear form of the many confused and conflicting statutes bearing upon the subject affected by the Eighteenth Amendment; (3) an addition to the statute making more effective the so-called padlocking provisions of the law; and (4) a provision for relieving the congestion in the Federal courts, by enabling petty cases of casual or slight violations of the law to be disposed of through United States Commissioners."

Objections have been raised, according to Mr. Wickersham, that the prosecution of petty misdemeanors upon information instead of indictment, and by trial by the court without a jury, after hearing before a United States Commissioner, would rob citizens of the right to trial by jury. "The claim is without substance," he said in reply. "The right to trial by jury, secured by the Constitution, never did extend to petty misdemeanors. But even in the case of such misdemeanors, the recommendation of the Commission would secure to a defendant charged with one of these petty offenses the right of trial by jury, should he demand it in season. The adoption of our recommendations, we believe, would very greatly relieve the congestion in prohibition cases in the Federal courts."

It may be stated here, parenthetically, that the first recommendation of the Commission, that the agencies for detection and prosecution of prohibition violations be transferred from the Treasury to the Department of Justice, has, since the time of Mr. Wickersham's address, been adopted by Congress.

Upon the whole problem of law observance and enforcement in general, said Mr. Wickersham, the preliminary studies of the commission led to the conclusion that a far more comprehensive survey of the whole subject of the organization, jurisdiction, and procedure of the United States courts was necessary, and that such an inquiry could best be carried on through the law schools of the country. A committee to undertake this work has been appointed, composed of Charles E. Clark, Dean of Yale Law School, Hon. Owen J. Roberts, of Philadelphia, Prof. E. M. Morgan, of Harvard Law School, Dr. O. K. McMurray, Dean of the University of California Law School, and Robert M. Hutchins, President of the University of Chicago.

In addition, an advisory committee has been appointed on penal institutions, probation and parole, headed by Dr. Hastings H. Hart, of the Russell Sage Foundation, a distinguished authority on penology. A study of the direct and indirect cost of crime will be made by Mr. Goldthwaite H. Dorr,



HON. R. B. BENNETT

President Canadian Bar Association and Honorary Member of the American Bar Association. President Bennett will have an active part in the arrangements for the Canadian entertainment of the visiting English, Scotch, Irish and French lawyers this summer.

former assistant United States attorney, assisted by Sidney P. Simpson of New York.

Abuses in law enforcement are being studied by Mr. Walter H. Pollak of the New York bar and Prof. Zechariah Chafee of Harvard Law School. Miss Edith Abbott, Dean of the graduate school of social science administration of the University of Chicago, is working on the subject of "Criminal Justice and the Foreign Born."

### Visit of Foreign Bars

THE Committee on Arrangements for the entertainment this summer of the visiting members of the English, Scotch, Irish and Paris Bars held a meeting in Chicago on February 14. Various details as to reception, itinerary and entertainment were discussed, but no official announcement was made. The following members of the committee were in attendance: Silas H. Strawn, Chairman; Henry Upson Sims, President; William P. Mac Cracken, Jr., Secretary; John H. Voorhees, Treasurer; Chester I. Long, R. E. L. Saner and Ralph A. Van Orsdel. The committee selected two additional members at this meeting: Guy A. Thompson of St. Louis and Wilson M. Powell of New York.

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# THE WORLD COURT AS A GOING CONCERN

Profound Ignorance as to Details of Institution to Be Found in the Most Unexpected Quarters—Composition of Court and Mode of Electing judges—League Merely Provides Organization Whereby More Than Fifty States Can Make Their Choice—Function of Court and Law It Applies—Intimate Description of How It Works, Drawn From Recent Experience\*

BY HON. CHARLES EVANS HUGHES

*Former Judge of the Permanent Court of International Justice*

IT is not my purpose to make a controversial address, but rather to give you an account of the World Court as a going concern. I shall make no apology for dealing with details of organization, as I have discovered that there is profound ignorance on this subject in the most unsuspected quarters. One of the world's famous statesmen, whom I met abroad last summer, asked me how the judges of the Court were elected, and from the sort of questions put to me in this country, even by lawyers, I am persuaded that, while there has been much discussion about the World Court, there is but little knowledge on the part of most people of the facts relating to its constitution and actual working. I trust that you will find the facts with respect to the organization of the Court interesting, and I shall take the liberty of adding a description of its methods in dealing with cases, giving you the impressions I have gained from my connection with it.

What is the World Court, or the Permanent Court of International Justice, as it is formally designated? It is a bench of fifteen judges, eleven ordinary judges and four deputy judges, the latter being called upon to serve in the absence of ordinary judges. Nine judges constitute a quorum, but it is intended that eleven shall sit if possible. Under the revision of the organization of the Court, which is now before the Governments for approval, the position of deputy judges will be abolished and instead there will be fifteen ordinary judges. This will give opportunity for calling the judges to sit in rotation, so long as eleven are available, an arrangement which may be used to facilitate the work of the Court. The judges are elected for nine years and all are elected at the same time except as vacancies arise which are filled by special elections for the unexpired term. The next election will take place in September, 1930, when the entire bench of fifteen judges will be chosen. When a State, or a country, as we say, which is a party to a case before the Court has none of its own nationals among the judges, that State may appoint a judge to sit in that particular case. In this way, there may be more than eleven judges sitting.

How are the judges elected? Manifestly, it is of vital importance to have competent and impartial men, and the method of selection deserves careful consideration. The Court is organized

under a constitution which is called the "Statute" of the Court, and this is put into effect by agreement among the nations that support the Court. This agreement is called the "Protocol of the Permanent Court of International Justice," and it has been signed by fifty-four States. The States in the Western Hemisphere that did not sign the original protocol of the Court are the United States, the Argentine Republic, Mexico, Ecuador and Honduras. In Europe, Turkey and Soviet Russia also did not sign.

Before the judges are elected, there must be nominations. For this purpose resort is had to the members of the old Court of Arbitration established under the Hague Convention of 1907, to which the United States is a party. That Court of Arbitration consists of members appointed by the various Governments and is really a panel of arbitrators from which selection can be made for particular arbitration. We have in the United States, for example, four members of the old Court of Arbitration who have been designated by the President: Elihu Root, John Bassett Moore, Newton D. Baker and myself. These national groups, respectively, of members of the old Court of Arbitration make the nominations of judges for the new World Court. The statute of the new Court recommends that each of these national groups should consult the highest court of their country, its legal faculties and associations devoted to the study of law, to the end that impartial and competent jurists should be proposed. After the nominations have been made, the election of judges of the World Court takes place in the Council and Assembly of the League of Nations. Let me say a word as to the reason for this method of selection. If you had fifty or more judges, representing fifty or more States, you might have an assemblage of an interesting character, but it would not be able to function properly as a court. It would resemble a parliamentary assembly with the maximum opportunities for delays, obstruction and the intrusion of politics. It would be practically impossible to maintain continuous, independent and satisfactory judicial work. But if you have a less number of judges, how are you to deal with the rivalries of Governments and obtain a court that will command the confidence of so many countries, both the great Powers and the smaller Powers? The organization of the League of Nations offered a method by which this difficulty could be solved.

\*Address of Hon. Charles E. Hughes before the Association of the Bar of the City of New York, Thursday evening, Jan. 16, 1930.

In the small body which constitutes the Council of the League the great Powers, Great Britain, France, Italy, Japan, and now Germany, are permanent members. The choice of judges by the Council would thus naturally represent the wishes of the great Powers. In the Assembly of the League all the fifty or more Powers stand on an equal footing, and the small Powers are in a great majority. Hence, election by the Assembly means that the small Powers have had their say. To elect the judges, there must be a majority in each body, and the concurrent elections by both the Council and Assembly mean the concurrence of the Powers, both great and small. If the two bodies do not agree on a choice, a conference committee, like one of the conference committees of our Senate and House of Representatives, is appointed and, if an agreement is not reached in this way, the members of the World Court, already chosen, proceed to elect.

There is much talk in this country as to the election of judges by the League of Nations. It is quite evident, however, that if upwards of fifty States are to elect judges they must meet in some way for this purpose. If there were no League of Nations, and a World Court were set up, the Governments would have to arrange for an organization to elect judges. The League of Nations is frequently spoken of as though it were a unit, or acted as an entity in the election, but it is really composed of all these States, or countries, which have different policies and objectives and, when it comes to the selection of judges, they are not acting with the unity of a league but proceed according to their several conceptions of what the situation requires in the selection of a body of judges, who are not to execute orders but to pass upon the controversies which arise when States are unable to agree. The League of Nations provides an organization by which all these countries can make their choice. If the United States adheres to the protocol of the Court, it will be entitled to participate as a Great Power in the elections in both the Council and Assembly. It would naturally be expected that nationals (that is, citizens) of great States, in view of the magnitude of their interests, would always be found in the membership of an international court and thus that nationals of such countries as Great Britain, France, Italy and Japan would be selected. The same would be true of the United States if it supported the Court, as it has been true of the United States even in the absence of that support. There has always been a citizen of the United States on the World Court. Germany has no national on the Court at present, but it is most probable that she will have after the next election of judges. If all these great Powers had nationals on the Court, this would account for six of the fifteen judges and nine others would be nationals of other and smaller Powers. The conflict in interests, which there is nothing in the organization of the League of Nations even to obscure, much less to destroy, naturally tends to bring about the selection of men who by reason of their age, their experience, their character and attainments enjoy the confidence of the large group of small Powers whose part in the election is essential. For whatever great Powers may do when they fall into controversy, resort to the Permanent Court is

recognized as the most important guarantee of justice to the smaller Powers. Their interest in the selection of judges is therefore very keen. As the men proposed by the national groups of great Powers must submit themselves to the election by the smaller Powers, the great Powers naturally put forward men of eminence whose records they think will stand scrutiny; and as the judges proposed by the groups in the smaller Powers are to pass upon the controversies of the great Powers, they are prompted to offer men of the required competence. No institution in this world can escape human limitations. We have had difficulties at times with reference to the choice of men for the Supreme Court of the United States. If you reflect upon the selection of judges for a permanent international court, I am inclined to think that you will find that it would be difficult to suggest a method which in its general features would be more likely to secure a bench of international judges in which confidence could be reposed. If you sought to establish a world court independently of the League of Nations, the fifty or more States which are now members of the League would have to join in electing judges and it would be necessary to provide a practical plan by which you would have an organization of all the States concerned which would measurably correspond to the organization of the Council and Assembly of the League in order to insure the balance of the small and great Powers which is essential to the establishment of an effective tribunal. I think that the real point with some of our friends who oppose the present method of selection is not that the method itself is inherently defective, but that they are opposed to a permanent court altogether. But for many reasons, which I cannot undertake at this time to detail, it has long been the desire and policy of the United States to have a permanent international court.

Similar considerations apply to the fixing and payment of the salaries of the judges and the expenses of the Court. The League provides the organization for this purpose, but it should be remembered that it is upwards of fifty countries composing the League and supporting the Court that fix the salaries and that these countries pay them together with the expenses of the Court according to their quotas. If there were no League, the salaries and expenses of a world court would have to be contributed by the supporting governments, and there would have to be machinery for making the budget apportionment and payment. What is really of importance is the fact that when judges have been elected, neither they nor their decisions are subject to the control of the League. A judge can be dismissed only when in the unanimous opinion of the other judges he has ceased to fulfill the required conditions. I should add that the ordinary judges, as distinguished from the deputy judges, are not permitted to exercise any political or administrative function during their term of office. The revision of the statute of the Court, which is now awaiting approval, not only contains this prohibition but also provides that the members of the Court may not engage in any other occupation of a professional nature.

What is the function of the World Court? It is to pass upon questions which arise between

States. It does not take cognizance of controversies between individuals, or controversies between individuals and a State. A State may make the cause of its nationals its own, and thus present a controversy with another State, of which the Court has jurisdiction. This was illustrated in the cases decided at the last term of the Court between France and Brazil and France and Yugo-Slavia, in each of which the French Government has espoused the cause of the holders of bonds issued by the other Government.

Unless the States which support the Court have otherwise agreed, resort to the Court is not compulsory; they retain the right to refuse to submit their cases to the Court. In the proposal that the United States should adhere to the protocol of the Court, it has not been suggested that the United States should accept a compulsory jurisdiction. If the United States adheres, it can still refuse to submit to the Court any particular controversy. The Court will not decide a dispute between States unless the parties to the dispute have consented to its submission to the Court.

Now there is a class of controversies which Governments ought always to be willing to submit to judicial settlement. These are controversies over what are essentially questions of law as distinguished from questions of mere policy. They are disputes concerning questions of international law, as to the interpretation of treaties, as to the existence of facts out of which international obligations arise, or as to the reparation that should be made when there has been a breach of an international obligation. Questions of this sort in all civilized countries are normally disposed of by judicial tribunals. It has been the declared policy of the United States that such questions should be submitted to arbitration, which is a form of judicial settlement. We have not taken the unreasonable position before the world that we would take the law into our own hands and that where we had a legal dispute with another country we should insist on deciding it for ourselves. The Pact of Paris, or the Kellogg pact, would be but a ridiculous form of words if the attitude of those who signed it were otherwise, for this agreement says not only that war is renounced as a national policy but that the settlement of disputes shall be had only by pacific means. Pacific means for the settlement of a legal controversy, if the parties cannot come to an agreement, is judicial settlement. In the class of questions I have just described, the statute of the Court provides that the States supporting it may, if they choose, sign what is called an optional clause accepting compulsory jurisdiction. A considerable number of States—I believe about forty-two—including Great Britain, France, Italy and Germany—have signed this clause. A large number of these have not as yet ratified. Aside from this optional clause, there are a great number of special treaties between countries which provide for the submission of controversies to the World Court if the parties find themselves unable to agree.

What law does the Court apply in the disposition of the controversies? It applies international law. What is international law? It is the body of principles and rules which civilized States consider as binding upon them in their mutual relations. It rests upon the consent of sovereign States. There are many questions which are discussed by inter-

national jurists with respect to principles which are not yet embodied in international law as there is no satisfactory evidence of the consent of States to be bound by them. There are also particular principles and rules that are binding upon particular States because they are established by treaties between such States. These rules are not, properly speaking, international law, but they govern the States that have agreed to them. If there is a dispute as to a question of international law and the Court finds that there is no international law on the subject, it says so. It is not its function to create rules of international law. It explores, hears arguments and determines whether there is a rule of international law applicable to a given case. Its decisions on such questions expound and clarify international law. The law thus develops in a normal way by the unfolding of its accepted principles in their application to particular disputes. But the Court does not assume the function of a legislature. The Court is naturally very cautious in this part of its work; an international court would not long survive that took to itself the legislative function or the making of law for States. In the ascertainment of international law, the Court examines international custom as evidence of a general practice accepted as law, the general principles of law recognized by civilized nations, and also judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law.

It is often said that before an international court can properly function there should be law to apply. Of course, there is an existing body of international law. No intelligent person would deny that. What is meant is, that it is a limited body, and that it should be extended so as to provide adequately for the government of the relations of States to each other. That process is involved in what is called the codification of international law, a phrase used ambiguously, but generally taken to describe both a definite statement of existing law and also desirable modifications in order to add to and improve the law. That progress should be made in the codification of international law is the earnest desire of jurists and all who seek to hasten and make secure the reign of law in place of force. The intelligent efforts now being made in this direction are among the most gratifying signs of our times and worthy of all praise and support. But it must be recognized that the process is an extremely slow one, for it depends not only upon the acquiescence of jurists in definitions and proposed changes, which is about as difficult to secure as a consensus of theologians, but also the final approval of governments, which is almost impossible to obtain when the questions involved are of serious practical importance and the objectives of governments differ. Such statements and amendments of the law require the same acquiescence of the States composing the family of nations as that which underlies existing international law. It should also be observed that even where there is an accepted principle of law, it fares much better in the application of it to particular states of fact in controversies as they arise than in an attempted formulation of it in the endeavor to enact a rigid statute. That has been the experience in efforts at codification of domestic or municipal law and obviously the difficulty is far greater when you come to

a rigid formulation of international concepts. When a court applies a principle, you may readily recognize it and appreciate its application although not entirely content with the linguistic expression of it in the judicial opinion.

Neither the desirability nor the difficulty of codifying international law furnishes any reason for delay in establishing or supporting a permanent international court. You would still have to arrange for the pacific settlement of international disputes. You could not decide them for yourselves. If you gave the decision to arbitrators in sporadic arbitrations, you would have the same difficulty, and, in my judgment, a much less satisfactory judicial tribunal than a permanent court such as the World Court. If you were to wait for an international court until you could get a satisfactory body of international law, the only time that such a court could function would be in the millennium and most people may doubt whether at such a time it would be necessary.

This discussion, as to the importance of a body of law for the Court to apply, generally takes too little account of the actual conditions with which we are confronted. There are many hundreds of treaties in force. They are multiplying all the time. Most States are now enmeshed in treaties. And the great volume of work occupying the World Court lies in the interpretation of treaties. All languages are more or less imperfect as the vehicle of intention. Some ambiguities are premeditated, others are disclosed in the unexpected circumstances which always arise. New contingencies suggest shades of meaning. Thus treaties must have their judicial interpreters if nations cannot agree as to their meaning or application, and are not going to fight about them. The science of interpretation is a familiar one in all civilized countries and there is general agreement on the cardinal principles of interpretation. And this is peculiarly a judicial function. It will keep the World Court busy.

Some have said that the World Court applies what they call "League Law." It goes without saying that as the Covenant of the League is a treaty between those who have signed it, it is to be applied like any other treaty to their disputes. But it is binding only upon those who have accepted it. The United States has not. No international court would apply to a State the provisions of a treaty to which it was not a party and to which it had not acceded or adhered. What is called League Law is law for the members of the League in the sense that their agreement is obligatory among themselves. The fact that the United States is not a member of the League does not alter this in the slightest particular, and whether or not we support the World Court makes no difference in this respect. The Court must interpret the agreement between the members of the League fairly, as it must interpret our agreements fairly, if it has occasion to do so. The United States and every other country outside the League is bound only by what it has accepted and the others are bound by what they have accepted.

Some say that the United States is a country so powerful, so rich, and that there are so many who look at us askance, that it would be unsafe to entrust a decision even of legal questions to a permanent court. If that reasoning were accepted,

it might lead to the conclusion that it would not be safe to entrust the decision to anyone but ourselves, and we should have the frankness to acknowledge that we intend to maintain our own views at any cost, even if we have to fight for them. To my mind, there would be a far greater degree of insecurity in the long run in such a highly objectionable and intransigent attitude even on the part of a great and powerful nation. Particularly is this so when the great and powerful nation would be weakened in the effort to maintain such a policy by the large number of its citizens who desire peaceful settlements and by the fact that ultimate action must depend upon a Congress affected by this body of opinion. This is apart from the international obligation we have deliberately assumed to resort solely to pacific measures. As we have thus given our pledge to have legal controversies settled in a peaceful way, we should candidly admit that we need an international judicial tribunal to determine them.

How does the World Court work? I shall try to give you an intimate description of its procedure, my participation in which during the past year has been one of the most interesting experiences of my life. When the disputant States agree to submit their controversy to the Court, each party prepares what is called a Case, or Memoire, which sets forth its contentions, the facts which support them, the documents concerned, its arguments and authorities. Time is fixed for the presentation of these Cases and also for a Counter Case, or Counter Memoire, by each party in answer to the case of its opponent. Then, if desired, further time is allowed for a Reply on each side after the counter cases have been filed. It is, of course, possible that there will be some question of fact and the Court may, if it desires, take evidence or arrange for the taking of evidence. But ordinarily, on the full presentation of all the circumstances and documents, such disputes of fact as there may be are likely to turn out to be of an inconsequential character or to be sufficiently resolved by the documents submitted. The pleadings, evidence and arguments thus being in order, the controversy is called for hearing. The President of the Court, who is elected for three years and must reside at The Hague, presides. The first President of the Court was Judge Loder, the eminent Dutch jurist who had much to do with the foundation of the statute of the Court. The next President was Judge Huber, of Switzerland, far-famed as an international jurist. The present President is Judge Anzilotti, of Italy, a distinguished professor of law and possessing one of the most acute and fairest minds with which it has been my privilege to come into close contact. The judges sit in the order of their election and those elected at the same time in the order of their age. Adjoining them are such deputy judges as may have been called for the case and the national judges who may have been appointed where a party to the dispute has no national as a regular judge.

The practice at the hearing is largely after the tradition of arbitration. You will recall that, in the case of arbitrations, when the parties were ready and it suited the convenience of the arbitrators, the counsel and the arbitrators proceeded to some chosen place and there arguments were heard *ad libitum*. The Permanent Court is a paradise for advocates. It is the only permanent tribunal in

the world, in the work of which I have had the pleasure of participating either as counsel or judge, where counsel can talk as long as they please and without interruption. How I have envied them! Whatever impatience I may have felt at the length of the arguments, and the repetition which sometimes characterizes the discourses even of the best advocates, has been offset by my realization of the supreme satisfaction of the contesting counsel. It should be said, however, that, as Governments are parties, they are generally represented by men of recognized ability, who have made the most careful preparation. It is, of course, impossible for courts with crowded calendars such as those of our domestic tribunals to give a large amount of time to oral arguments, and, while they seek to be fair, and even generous, in their allowance of time in particular cases of importance, the pressure of cases of little importance shortens the opportunity. But when a court is so situated, as is the World Court, that it can hear very full arguments, it is of the greatest convenience to the judges, for when the argument is over they know all about the case. Every important document has been read, the material evidence has been painstakingly reviewed, every point thoroughly discussed and every weighty authority presented. As the arguments proceed, every judge has a stenographic report. There are long sittings, from about ten-thirty to one o'clock, and after a recess for luncheon from about a quarter past three to six or even seven. In the evening the report of the morning arguments is circulated, and late at night or early the next morning the report of the afternoon arguments. Each judge can each day check up on every point. If, after the principal argument on one side, opposing counsel suggest that they would like a day before starting their arguments, the request is likely to be granted. A similar course may be taken before the arguments in reply. In the case of the so-called Free zones about the Lake of Geneva, a controversy of long standing between France and Switzerland, as to which both countries felt deeply and which involved the consideration of the effect of treaties of 1815 and 1816, and the facts of a long intermediate history, counsel for France took about two days in opening the case. The Swiss counsel took three days for their answer. The French counsel took about two days for their reply and the Swiss counsel closed the case in another two days.

I am constantly asked to what extent the difference in language creates a difficulty. I should say, very little. There are two official languages, French and English. The parties may select either in presenting their documents. Generally, they select French. These can be translated, if any judge so desires. I should say, however, that I do not think that a judge could do his work satisfactorily if he did not read French easily. The revision of the statute of the Court, now before the countries for approval, provides that a judge shall be able to read both of the official languages and speak at least one of them.

The oral arguments may be presented in either English or French at the will of the parties. Another language may be chosen if the Court permits. Translators are always present and, whatever language is used, there is at frequent intervals a translation into the other official language. This

occurs generally about every twenty minutes or so. There are three translators who are busy taking notes of the oral argument and have extraordinary aptitude in immediately translating. When a document is read, it is handed to the translators, who translate the text. The stenographer's minutes, to which I have referred, distributed each day, are in both French and English. It is an advantage to a judge to understand spoken French, even if he does not speak it fluently. The present judges, with two or three exceptions, both read and speak English. The translators are also present in the consultation rooms and are ready, if desired, to translate from one language into the other. In the consultations most of the judges speak in French, some speak in English. As English is as much an official language as French, all the formal official work of the Court is in both languages, that is, the reports of the arguments are found in both languages and so are the judgments of the Court.

Immediately at the close of the oral argument, the Court goes into conference for the purpose of determining whatever preliminary questions are involved, that is, in relation to the jurisdiction of the Court, or with respect to the interpretation of the special agreement submitting the case to the Court, where question has been raised as to what is really before the Court for decision. This conference is entirely preliminary and as soon as the Court has decided, and this does not generally take very long, as to what questions are before it, a day is fixed for the submission of preliminary or tentative opinions. Thereupon each judge, before any consultation among the members of the Court as to the merits, proceeds to write a preliminary opinion, or note, on the facts and the law. This is rather a thrilling experience. It is a practice that could be had only in a court with abundant time at its disposal. But I confess that I sometimes wish that every member of our courts were required after an argument to write out an opinion as a basis for the consultation. No judge cares to appear at a disadvantage, although the opinion, or note, as it is called, is only tentative. He does not care to disclose a failure to study the case or to apprehend its points, or to appreciate the weight of the respective arguments. His mentality is somewhat at stake as well as the controversy. The result is that he is likely to pay close attention to the oral arguments, to examine with care every document, to consult each important authority; he may even analyze the oral arguments as he has them day by day; he keeps thinking about crucial points, awaiting with deep interest the development of the argument. The case absorbs all his waking thought and when the arguments is over he is likely to have a fairly clear idea of the case and to have shaped his views regarding it. Of course, judges in all courts differ. Some jump very quickly, perhaps took quickly, to conclusions, others find it difficult to jump at all. Some go directly to the point at issue and are disposed to brush aside philosophical inquiries that are not essential to the determination. Others may be more inclined to consider questions from the standpoint of eternal postulates and to work their way gradually from these to the particular dispute. It is the meeting of such minds, particularly in an international court, which gives to litigating governments ground for confidence

and keeps before the world the ideal of international justice.

As I have said, each judge in his own sanctum works on his own opinion knowing that it will be analyzed and eviscerated by equally if not more able men who have studied the case with the same attention. Generally five or six days, or perhaps a week, are given for the preparation of these preliminary opinions. They are filed with the Registrar of the Court and circulated in confidence to the members of the Court; a day or two is given for their consideration and then the Court meets in consultation. The President of the Court prepares the agenda for the consultation, listing every point of fact or law that is involved in what he believes to be a satisfactory order. This is circulated. The judges meet and first decide whether they will accept or amend the agenda. Each point is then taken up and discussed. It is discussed, even as counsel have discussed the case, without limit of time until, with all the courtesy that is due to brethren who differ, it appears that a vote should be had. Then a vote is taken on the particular question and the conference proceeds to the next point on the agenda. In this way, day after day, with long hours from morning to evening, the Court sits in the most intimate and candid discussion until finally the last question is reached and the vote is taken which decides the controversy. Thereupon, immediately and without either oral discussion or nominations, two members of the Court are selected by secret ballot to join the President of the Court in drafting the judgment of the Court in accordance with the majority vote. This committee immediately goes to work. It decides its plan of action according to the convenience of its members. By uninterrupted activity it prepares a draft judgment that suits the committee. The judgment recites the proceedings leading up to the hearing of the case, the points of fact, the various points of law; it discusses the questions, sets forth the determinations of the Court on each question, and then finally gives its award. The committee circulates its draft of the judgment and a couple of days are given to the other members of the Court to file in writing any amendments they propose. The committee considers these amendments, decides what it will accept or reject and circulates its revised draft. A conference of the full Court is then called for discussion of the draft. It is read like a legislative bill. Any point of objection is discussed and voted upon until finally the form of judgment has received the approval of the majority of the Court. A day is then fixed for a second reading on which dissenting opinions are required to be filed and, in the light of these opinions, the second reading is had and the final vote taken. Counsel for the respective parties are informed, the Court meets, hands down its judgment and calls the next case. The judgment of the Court, I should remind you, has no binding force except between the parties which have submitted the controversy to the Court and in respect of that particular case.

This, you will see, is extremely deliberate procedure, but nothing could be more important than deliberateness and thoroughness in the disposition of international controversies, where not the fortune of individual litigants are at stake but the future course of governments which have been un-

able to reach an accord as to their mutual obligations.

In all this work a judge, who has been appointed in a particular case by a government because it has no national among the regular judges, takes his place as a fully accredited member of the Court. He hears the arguments, gives his tentative opinion, participates in the consultations and votes with the rest of the judges. At first sight, it might be thought that this plan which carries forward the traditions of arbitral procedure would intrude a partisan element into the Court. It is to be borne in mind, however, that there is a national of the other party to the dispute already on the Court or similarly appointed. It must also be remembered that there are at least nine, and may be eleven, judges sitting, aside from judges thus temporarily designated. The Governments thus appointing a judge naturally desire to have a distinguished appointee and hence a jurist of high repute is generally designated. For example, in the case between France and Switzerland as to the Free Zones, Eugene Dreyfus, President of the Court of Appeals at Paris, was appointed judge *ad hoc*, that is, for that case, as the French judge who had been elected as a member of the Court had died and there was no French judge upon the bench. It must not be assumed that a judge who is appointed as a national of a particular country to sit in its case will decide in favor of that country. Lord Finlay showed the independence of a judge when he decided against Great Britain. He was a regularly elected judge. But quite apart from any tendency there may be in the case of national judges appointed for a particular case to look favorably upon the contentions of his country, the appointment of such a judge is, I found, of the greatest value in the work of an international tribunal. It greatly aids in disposing of any notion that a case has not been thoroughly considered or has been decided in any way than upon its merits as the majority sees them. The judge reads all the tentative opinions of his colleagues. He thus sees how the case has impressed each one of the judges from their individual preliminary statements. He meets with them in consultation and hears every position vigorously and thoroughly presented and discussed. He has the opportunity to present his own views. In his original opinion, in consultations, in criticisms of the draft judgment, at every point, he is heard. If the Court is against him, he knows why, and it is most probable that he will go back to his country with the message that whatever may be thought of the judgment there was not the slightest question of the sincerity, the independence and the thoroughness of the consideration of the case. If he was not there, if no national of a State which is a party to the dispute were on the Court, it would be far easier to give currency to notions of the intrusion of political and partisan considerations.

In the comprehensive discussions in the consultation room, there is, of course, opportunity for vigor and effectiveness in debate. Judges are not only human in their limitations, but in their aspirations. They desire the respect of their colleagues. They hope for the esteem of the world. There is only one way that they can get either or both, and that is by using all the ability that God has



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HON. CHARLES EVANS HUGHES

Named Chief Justice of the United States to succeed Chief Justice Taft.

given them, by unremitting industry, by candid expressions. That I have found to be characteristic of the international Court. Whatever defects it has are those which inhere in all our imperfect human undertakings. They are found in our domestic courts, even in the highest. The one thing that has impressed my mind is this. After sitting alone, with one's own task, endeavoring to reach a conclusion as to the merits of a stubbornly contested dispute, wondering what one's colleagues think of the different points that have been laboriously argued, one cannot but have a feeling of exaltation in reading the preliminary opinions as they come in, and in realizing to what extent the minds of men drawn from many countries move along the same lines of careful reasoning. Whether one agreed or not with this or that opinion, one's respect was heightened by the exhibition of intelligent and conscientious application, of learning and mastery, of the power of analysis and cogent statement, which are the marks of judicial work of superior excellence. There has always been danger in all tribunals, both domestic and international, whether constituted by arbitral arrangements or otherwise, of the alloy of policy, even of intrigue, of attitudes taken in deference to power rather than to justice. I am inclined to think that this sort of influence is much more to be dreaded in international arbitrations, such as it is in most cases practically possible to set up, than in such an organization as the World Court. The way to meet such intrusions is by the earnestness and ability of

judges who are not respecters of persons of particular governments, but of the law and of justice, by winning the victories of reason in intimate debates, by well considered deliverances which satisfy intelligent opinion. In this way the Supreme Court of the United States, despite all the difficulties that surrounded its early days, has come to be more firmly established in the respect and confidence of our people than any of the other institutions of government.

I have not discussed the terms of the protocol which has been signed on behalf of the United States for its adherence to the World Court. I referred to them in an address before the American Society of International Law. They will be the subject of abundant discussion by others and I have preferred to devote my time on this occasion to the effort to give you a picture of the Court at work. I may say, however, that in my opinion the conditions of this protocol fully protect the interests of our country.

The judicial settlement of international disputes cannot be adequately secured by mere sporadic, occasional efforts. There should be continuity, permanency, the opportunity for the growth of confidence and for the firm establishment of the tradition both of competency and judicial independence. As a nation devoted to the interests of peace, we have the utmost concern in this development. To hold aloof is to belie our aspirations and to fail to do our part in forming the habit of mind upon which all hopes of permanent peace depend. In supporting the World Court in the manner proposed, we lose nothing that we could otherwise preserve; we take no serious risks that we could otherwise avoid; we enhance rather than impair our ultimate security; and we heighten the mutual confidence which rests on demonstrated respect for the essential institutions of international justice.

#### Compiled Indian Laws Passed Since 1913 Published

ALL laws relating to Indian affairs enacted by Congress between December, 1913, and March, 1927, have been collected in Volume IV of the *Compilation of Indian Laws and Treaties*, compiled by Charles J. Kappler, and published by the Government Printing Office, pursuant to resolution of Congress.

There is also included a list of all treaties made with the Indians from 1778 to 1868 which have been before the United States Supreme Court for adjudication, with citations to opinions. The famous Northwest Ordinance of 1787 on the rights of the Indians, a historical statement of the Fort Laramie Treaty of 1851, an article entitled "Power of Congress to Abrogate Indian Treaties," a memorandum on Federal Jurisdiction over Indian Lands, Allotments, Alienation, and the Determination of Heirs of Deceased Indians, and an article on the "Doctrine of Indian Right of Occupancy and Possession of Land," are also included, as papers which will prove valuable references for Senators and Representatives.

Citations are also given to all cases in which laws passed since 1913 relating to Indians have been before the courts or departments for adjudication. Title 25 of the United States Code Annotated, on the subject of "Indians," is also included.

# LIABILITY OF PHYSICIANS FOR STERILIZATION OPERATIONS\*

Increasing Number of Such Operations Both in Public Institutions and Private Practice Suggests Importance of Determining the Civil and Criminal Liability, if Any, of Physicians Who Perform Them—Old Legal Principles and Modern Operations—Statutory Prohibitions—Lack of Precedents Bearing on Civil Liability

BY JUSTIN MILLER AND GORDON DEAN

IN the State of California between 1910 and 1929, six thousand and fifty-five operations have been performed in public institutions of the state designed to prevent reproduction of the human species. Approximately three thousand such operations have been performed in other states during the same period. Generally speaking this practice has been carried on under the express provisions of statutes permitting voluntary sterilizations in some cases and requiring compulsory sterilizations in others. The operations most frequently used for this purpose are that of vasectomy as applied to males and salpingectomy as applied to females. We are assured by the members of the medical profession who have developed these techniques that, unlike castration and spaying, vasectomy and salpingectomy do not desexualize the individual or produce other physical or mental changes except such as may grow out of a realization that the child-producing function has been destroyed. The constitutionality of statutes providing for the sterilization of the unfit has been established in a number of states and by the Supreme Court of the United States. The courts have been more reluctant about conceding the constitutionality of statutes providing for the sterilization of criminals.<sup>1</sup>

In most of the statutes which provide for the sterilization of the unfit in state institutions, there have been incorporated provisions, absolving from civil and criminal liability, those who perform such operations. As yet, none of these provisions have been passed upon by courts of review. Presumably, in order to avoid liability, the provisions of the statutes must be strictly complied with.

We have no records to reveal the number of operations for sterilization which are performed in private practice. That the number is large, there seems to be no doubt. As to the nature of cases in which such private operations are performed, students of the eugenic phases of sterilization declare that persons with physical defects furnish most of them. For instance, in California, a large number of sterilizations among women are the result of tuberculosis. Defective organs such as hearts, livers, or kidneys, which would be apt to fail in the emergency of childbearing, provide the incentive of

others. Ordinarily the purpose is therapeutic<sup>2</sup> rather than eugenic, nevertheless there are cases of voluntary private sterilizations where the purpose is to cut off a strain of defective germ-plasm, as in the case of a diagnosis of hereditary insanity or in case of the marriage of two persons each with a pronounced family history of cancer. We may safely assume, no doubt, that in some cases the purpose of the operation is merely to remove danger of pregnancy.

Whatever the motive may be which inspires such an operation and whatever the purpose which is designed to be served, the increasing number of such operations, both in public institutions and in private practice, suggests the importance of determining the civil and criminal liability, if any there be, of physicians who perform them.

## Criminal Liability

An operation for sterilization would clearly result in criminal liability in many cases. Death resulting from such a cause, if no justification or excuse were present, would make the perpetrator guilty of a homicide, varying in degree according to the malice and intent in his mind at the time of the act. It is unnecessary to carry our inquiry further on this point. The usual considerations in determining liability for homicide would be pertinent here. Gross negligence, general criminal intent, the fact of being engaged in the commission of another felony, might each be sufficient to supply the element of intent.<sup>3</sup> The main consideration would be that of causation, and death resulting.

In similar manner such an operation might result in liability for mayhem or maiming. This would be clearly true in case of castration because the effect of the operation is to change the entire physical character of the individual.<sup>4</sup> In its earlier development the crime of mayhem was defined as

2. A distinction between eugenic and therapeutic purposes is important under some of the sterilization statutes. (See notes 25, 26, 27, 28 *infra*.) "Medical" and "therapeutic" are probably synonymous. (See *Williams v. Scudder*, 102 Ohio State 303, 131 N. E. 481, 482; *Gould Med. Dict.* (3d ed.) p. 1380.)

3. *Gross Negligence*. See note 61 L. R. A. 287, 289. See also *State v. Reynolds*, 42 Kan. 320, 22 Pac. 410, 16 Am. St. Rep. 483 (1889) and note; *State v. Hardister*, 38 Ark. 605, 42 Am. Rep. 5 (1892).

*General Criminal Intent*. *Clark and Marshall Crimes* (3d ed.) Sec. 343; *State v. Moore*, 35 Iowa 128, 95 Am. Dec. 776 (1868); *State v. Lodge*, 9 Houst. (Del.) 543, 33 Atl. 313 (1892).

*Homicide in Commission of Felony*. 1 Hale P. C. 473; 21 Mich. L. Rev. 95. See *Clark and Marshall Crimes* (3d ed.) 195, and cases collected in 63 L. R. A. 252. At present, Utah is the only state which makes an unlawful sterilization operation a felony. (See note 28 *infra*.)

In two states unlawful sterilization operations are misdemeanors (notes 30, 31 *infra*). Homicide in commission of misdemeanor (63 L. R. A. 379 et seq.).

4. Castration: *Bouvier Law Dict.* 1 Hawk P. C. 107; *Bishop Crim. Law* (9th ed.) Sec. 1001.

\*Full title of paper is "Civil and Criminal Liability of Physicians for Sterilization Operations."

1. For a full discussion of the law involved in the preceding introductory paragraphs see, "The Law and Human Sterilization" by Otis H. Castle, 53 Reports of Am. Bar Assn. 556.

"when one shall diminish the strength of another's body and weaken him thereby to get his own living and by that means the commonwealth is deprived of the use of one of her members."<sup>5</sup> It was sometimes said that the gist of the offense consisted in the fact that the injured person was less able to fight or to defend himself.<sup>6</sup>

In cases both of homicide and mayhem, even the consent of the person castrated would not serve to excuse the physician, for it is clearly established that consent of the injured person in this type of case does not operate to prevent criminal liability.<sup>7</sup> The rule was well stated by Stephen in his History of English Criminal Law as follows: "No one has the right to consent to the infliction upon himself of death or any injury likely to cause death except in cases of necessary medical operations from which death might result, or to consent to the infliction upon himself of bodily harm amounting to a maim, for any purpose injurious to the public."<sup>8</sup> This rule has been generally followed in the United States.<sup>9</sup> Similar provisions are commonly found in the statutes governing operations to produce abortions.<sup>10</sup> Although no case has been found at the common law where a physician was held criminally liable for performing a castration operation upon a person with his consent, nevertheless criminal liability would seem to be certain in such a case in view of the gist and scope of the crime of mayhem and the attitude of the law toward the effect of consent in such cases. Of course justification or excuse might appear from the facts of the particular case which would absolve the surgeon from criminal liability.<sup>11</sup>

An interesting subject of inquiry is opened up when we attempt to apply these principles of law to the modern sterilization operations of vasectomy and salpingectomy. As has been pointed out already they are entirely different from the cruel and despoiling operations known to the common law. It is true that in at least one recent case the use of the modern operations was condemned as constituting cruel and unusual punishment.<sup>12</sup> This decision would seem to have resulted from a misunderstanding of the nature and effect of these operations.<sup>13</sup> Under the provisions of the common law, vasectomy

and salpingectomy could hardly constitute mayhem. The elements of "rendering one less able to defend himself" or to "fight for the king" or "less able to earn his own living" are not results of the operations as they are now performed.<sup>14</sup> Unless the courts could find in the common law definitions of the crime of mayhem something to indicate that it was intended to include a prohibition of operations which produced merely an inability to procreate, then there would seem to be no basis for fixing a criminal liability.

Practically all of the states have incorporated into their codes definitions of the crime of mayhem. Under these statutes, the crime is much broader than at common law.<sup>15</sup> The elements of the crime as outlined in these statutes differ considerably. Many require an intent to maim.<sup>16</sup> Two make a "premeditated design" a special element of the offense.<sup>17</sup> Some apparently have departed entirely from the concept of the common law and make the crime consist in the unlawful and malicious removal of a member of a human being or the disabling or disfiguring thereof or rendering it useless.<sup>18</sup> The operations of vasectomy and salpingectomy would render useless the procreative organs, in the sense that they would be no longer useful for purpose of procreation. For the gratification of sex desires,<sup>19</sup> for satisfying the law as to potency,<sup>20</sup> for committing the crime of rape,<sup>21</sup> they would still be useful. In each case the answer might vary according to the point of view of the patient or of the judge.

If the consent of the person were given, it is probable under present day statutes that there would be no liability for mayhem, for consent given would usually warrant the conclusion that malice, a necessary element of the crime, was not present in the mind of the physician. This would not necessarily follow, however, for malice on the part of the operator may exist concurrently with consent on the part of the patient.<sup>22</sup>

No case has been found of much value to the instant discussion for, out of the nine cases<sup>23</sup> reaching the appellate courts of the various states in which mayhems were committed by injuries to the private parts of the male or female, not a single one of the acts complained of was accomplished with the consent of the sufferer. Most of the cases involved castrations. The only one of these cases which approach the problem of the liability of a

5. Bishop Criminal Law, (9th. ed) Sec. 1001, quoting from an old authority, Poulton.

6. 1 Hawk. P. C. 107; 1 Inst. 107 a, b, in Stephen's Digest (7th ed.) 290.

7. See *People v. Clough*, 17 Wendell 351, 31 Am. Dec. 303 (1837) for a full discussion, and *Rex v. Wright*, 1 East P. C. 396, Co. Litt. 127a.

8. In abortion cases where death results, the homicide is not justifiable. *State v. Magnell*, 3 Penn. (Del) 307, 51 Al. 606 (1901); *State v. Moore*, 25 Iowa 128, 95 Am. Dec. 776 (1868). The same is true where death is the result of a duel. *Regina v. Barronett*, Dears C. C. 51.

9. Stephen Digest of the Criminal Law, Art. 891. See *Journal Social Hygiene*, Vol. 14, No. 2 (March, 1928). Other uses of castration in history, see *Sterilization for Human Betterment*, by E. S. Gorney and Paul Popenoe, Ch. 2 (1929).

10. Wharton Cr. Law, (11th Ed) Sec. 182; Clark and Marshall Crimes (3d. ed.) Sec. 150. See *People v. Clough* 17 Wend 351, 31 Am. Dec. 303 (1837). See notes 7 and 10.

11. Abortions committed by the pregnant woman upon herself are punished in most of the state statutes. Cal. Penal Code, Sec. 275; Bender's N. Y. P. C. 1928, Sec. 61; *State v. Carey* 76 Conn. 342, 56 Atl. 632 (1904). So the consent of the woman is not a defense. *State v. Carey* supra; *State v. Magnell* 19 Del. 307, 51 Atl. 606 (1901); *Barrow v. State* 121 Ga. 187, 48 S. E. 950 (1904); *State v. Moore* 25 Ia. 128, 95 Am. Dec. 776 (1868); *People v. Abbott*, 116 Mich. 268, 74 N. W. 529 (1898); *Willingham v. State* 33 Tex. Cr. 98, 25 S. W. 424 (1894); *Smith v. State* 33 Me. 48, 54 Am. Dec. 607 (1851).

12. Justification or excuse would be material in showing an absence of willfulness or malice under the mayhem statutes. *Bowers v. State*, 24 Tex. App. 549, 7 S. W. 247, 5 Am. St. Rep. 901 (1888); *High v. State*, 20 Tex. App. 545, 10 S. W. 338, 8 Am. St. Rep. 458 (1888). (See note 60 infra.)

13. *Hendricks v. Mickle*, 262 Fed. 677, D. C. D. Nev. 1918; *Davis v. Berry*, 216 Fed. 412, D. C. S. D. Iowa 1914. See also dissenting opinion in *Smith v. Command* 231 Mich. 409, 204 N. W. 140, 142 (1926).

14. "From the standpoint of pain it is comparable to the extraction of a tooth." *Castle, Human Sterilization and the Law*. See majority opinion in *Smith v. Command*, supra nt. 12.

14. Sterilization produces no change in the sexual life; no organs or glands are removed; no feelings are altered. *Sterilization for Human Betterment*, p. 21.

15. Mere disfigurement was not mayhem at common law. *East Crown Law* 303; *Terrell v. State*, 86 Tenn. 523, 8 S. W. 313 (1884). Statutes have included many new inflictions unknown to the common law. *State v. Sheldon*, 54 Mont. 185, 169 Pac. 87 (1917).

16. *U. S. v. Scroggins*, Fed. Cas. 16343 (1847); *State v. Hair*, 37 Minn. 351, 34 N. W. 693 (1887); *High v. State*, 26 Tex. App. 545, 10 S. W. 238, 8 Am. St. Rep. 458 (1888).

17. See note L. R. A. 1916 E 494.

18. *Kitchens v. State*, 80 Ga. 510, 7 S. E. 309 (1888). A typical mayhem statute in Cal. Pen. Cd. Sec. 203. See *People v. Wright*, 93 Cal. 564, 29 Pac. 240 (1892); *State v. Bunyard*, 253 Mo. 547, 161 S. W. 756 (1912).

19. *Sterilization for Human Betterment*, supra, p. 29.

20. Want of power for copulation is impotence; but mere sterility is not. *Turner v. Avery*, 92 N. J. Eq. 473, 113 Atl. 710 (1921). See also *Griffith v. Griffith*, 162 Ill. 368, 44 N. E. 820 (1896); *Kirschbaum v. Kirschbaum*, 98 N. J. Eq. 7, 111 Atl. 607 (1920). (Anonymous 89 Ala. 291, 7 So. 100, 18 Am. St. Rep. 114, 7 L. R. A. 495 (1890); *Payne v. Payne*, 46 Minn. 467, 49 N. W. 280, 34 Am. St. Rep. 249 (1891). 21. Well illustrated by *Rudd J.*, in *In re Thomson*, 103 Misc. Rep. 23, 169 N. Y. S. 638, 643 (1915).

22. See notes 4, 5, supra. Note L. R. A. 1916 E. 494, 497. See also *Green v. State* 151 Ala. 14, 44 So. 194, 125 Am. St. Rep. 17 (1907).

23. *Daggs v. State*, 15 Okla. Cr. Rep. 127, 175 Pac. 260, (1918); *Choate v. Comm.*, 176 Ky. 427, 195 So. W. 1080, (1917); *State v. Sheldon*, 54 Mont. 185, 169 Pac. 87, (1917); *Col. v. State*, 62 Tex. Cr. Rep. 370, 138 S. W. 109 (1911); *People v. Schoedde*, 126 Cal. 373, 58 Pac. 859 (1899); *Kitchens v. State*, 80 Ga. 510, 7 S. E. 309 (1888); *State v. Fry*, 67 Iowa 475, 25 N. W. 728 (1885); *Worley v. State*, 11 Humph. (Tenn.) 173 (1850); *Moore v. State*, 4 Chand. (Wis.) 168, 3 Pinney 373 (1851).

physician is the California case in which conspirators hired a veterinary surgeon to perform the operation.<sup>34</sup> In these cases, which involve the use of force and violence upon the complaining witness to effect the operation, we have nothing comparable to a private operation for sterilization by a physician according to modern methods and with consent.

In recent years a few of the states which have adopted sterilization statutes have incorporated therein two types of prohibitory provisions with regard to the performance of non-therapeutic private operations of sterilization.

First, the statutes of Indiana,<sup>35</sup> Utah,<sup>36</sup> Mississippi,<sup>37</sup> and Virginia,<sup>38</sup> make the following provision for therapeutic operations of sterilization:

"Nothing in this act shall be construed so as to prevent the medical or surgical treatment for sound therapeutic reasons of any person in this state, by a physician or surgeon licensed in this state which treatment may incidentally involve the nullification or destruction of the reproductive functions."

The Indiana statute makes a further qualification, "provided that such treatment shall be that which is recognized as legal and approved after due process of law."

It will be noted that this type of provision does not make such operation a criminal offense, and no punishment is provided. It is probably at most a provision designed to avoid civil liability except where the operation is non-therapeutic, or possibly even where the physician is unlicensed, or the operation "primarily" (as distinguished from "incidentally") involves the nullification or destruction of the reproductive functions. If the operation did contain any of the above impliedly prohibited circumstances, an attorney might well hesitate to advise a physician that he might safely perform the operation in a state which had such a statute. Especially would this be true in Indiana.<sup>39</sup>

Second, in three states, Iowa,<sup>40</sup> Kansas,<sup>41</sup> and Utah,<sup>42</sup> a direct penal provision is found:

"Except as authorized by this act" (the act refers to the sterilization of the unfit in state institutions,) "every person who shall perform, encourage, assist in, or otherwise promote the performance of either of the operations" (vasectomy and salpingectomy) "for the purpose of destroying the powers of procreation, unless performance of such operation is a medical necessity, shall be guilty of a misdemeanor."

Utah is the only state which incorporates in its acts both of the above provisions. The Michigan sterilization act of 1913 contained substantially the second provision, but the act was held to be unconstitutional on account of other provisions therein contained and when it was reenacted in 1923 and amended in 1925, the provision was omitted.<sup>43</sup>

In those states which have penal provisions regulating liability for performance of such operations without therapeutic or medical justification,<sup>44</sup> liability is determined thereby. Where the state has nothing but a mayhem statute which follows

the common law concept, it is very doubtful if the modern operations for sterilization could be classed as criminal. Where the statute speaks in terms of "rendering useless" a member or organ of a human being, there is possibility of a decision either denying or establishing liability. In any event malice seems to be an element essential to criminal liability in such a case.

Even though the physician be not guilty of mayhem, under settled rules of criminal law, if the operation were performed without the patient's consent, it would constitute a criminal assault;<sup>45</sup> likewise if the patient submitted to the operation but was incapable of giving legal consent.<sup>46</sup> If consent were given there would be no liability for an assault and battery,<sup>47</sup> unless of course the act amounted to a breach of the peace,<sup>48</sup> which would be improbable.

### Civil Liability

The question of the civil liability of the physician for a privately performed sterilization operation presents an equally interesting problem. Naturally the question is not so difficult where the plaintiff has given his or her consent to the operation as where it has been performed by force and violence, thus constituting an assault and battery under the general principles of the law of torts.<sup>49</sup> Although there are a number of cases involving operations which incidentally resulted in the nullification of the reproductive functions,<sup>50</sup> not a single reported case has been found in which a person who has consented to a sterilization operation has brought suit against the physician. For lack of precedents we are forced to consider analogous situations in the law of torts and to indulge in speculation as to the principles of public policy which may be involved.

We may draw an analogy between the case of an illegal sterilization operation and an illegal abortion, for the courts would undoubtedly treat them in the same class, both illegal operations, prohibited, except in case of therapeutic necessity. Appellate courts of this country have considered nine cases of abortions where suit was brought by or for one who had consented to the operation. In four of the jurisdictions, Federal,<sup>51</sup> Kentucky,<sup>52</sup> Massachusetts,<sup>53</sup> and New York,<sup>54</sup> no recovery was allowed, on the principle that an illegal transaction cannot be made the basis of an action by one who is a party thereto. In five of the jurisdictions, Alabama,<sup>55</sup> Indiana,<sup>56</sup> Maine,<sup>57</sup> Ohio,<sup>58</sup> and Wisconsin,<sup>59</sup> recovery was allowed on the theory that "because of the state's interest, neither party has a right to

35. 1 Hawk, P. C. c. 15, Sec. 2.

36. Clark and Marshall Crimes Sec. 219 (3rd Ed.). See also a short discussion on the Right of Sterilization in (1929) 73 So. Jour. 258.

37. State v. Beck, 1 Hill (S. C.) 363, 26 Am. Dec. 196 (1833).

38. Commonwealth v. Collberg, 119 Mass. 350, 20 Am. Rep. 328 (1876).

39. Mohr v. Williams, 95 Minn. 261, 104, N. W. 12, 111 Am. St. Rep. 463, 1 L. R. A. (NS) 489 (1905) and note. See also note 26 A. L. R. 1036; 2 Cal. L. Rev. 319; and Rolater v. Strain, 33 Okla. 572, 137 Pac. 196, (1914).

40. In Wells v. VanNort 100 Ohio St. 101, 125 N. E. 910 (1919); Pratt v. Davis, 118 Ill. App. 161, 224 Ill. 300, 7 L. R. A. (NS) 609, 79 N. E. 568 (1906); King v. Carney, 85 Okla. 62, 204 Pac. 270 (1922); see note 58, 59, 64, 65 infra.

41. Hunter v. Wheat, 989 Fed. 604 (C. A. D. C. 1923).

42. Goldnamer v. O'Brien 98 Ky. 569, 36 L. R. A. 715, 33 S. W. 831, 56 Am. St. Rep. 373 (1896). This case is approved in Bigelow on Torts, p. 41.

43. Waclaw Szadwicz v. Cantor, 154 N. E. 251 (Mass. 1926).

44. Larocque v. Conheim, 48 Misc. 613, 87 N. Y. S. 625 (1904).

45. Hancock v. Hullett, 203 Ala. 378, 83 So. 552 (1919).

46. Martin v. Hardesty, 168 N. W. 610, (Ind. 1925), but see Courtney v. Clinton 18 Ind. App. 620, 48 N. E. 799 (1897).

47. Lembo v. Donnell, 118 Me. 505, 101 Atl. 469 (1917).

48. Milliken v. Hedgesheimer, 144 N. E. 264, (Ohio, 1926).

49. Miller v. Bayer, 94 Wis. 122, 68 N. W. 869 (1896).

34. People v. Schoedde, 126 Cal. 373, 58 Pac. 859 (1899).

35. Indiana Stats. 1927, Ch. 341, Sec. 6.

36. Utah Stats. 1925, Ch. 82, Sec. 6.

37. Mississippi Stats. 1925, Ch. 294, Sec. 6.

38. Virginia Ann. Code 1924, Ch. 45b, Sec. 1095m, (p. 569).

39. Indiana is one of the states in which consent to an abortion is not a bar to civil recovery against the physician by the patient (See note 46, infra).

40. Iowa Stats. 1924, Code of Iowa 1927, Ch. 168, Sec. 3364. When originally passed in 1915 the section was 2600a (3).

41. Kansas Stats. 1917, Chap. 299, Sec. 7. Revised Stats. 1923, Chap. 76, Sec. 177.

42. Utah Laws of 1925, Chap. 82, Sec. 7.

43. The original Michigan statute enacted in 1913 is found in the Comp. Laws 1915, Ch. 96, Sec. 5180 (5). The new act which omitted the penal provision is found in Stats. 1923, Act 285, Sec. 2, as amended in 1925, Act 71.

44. See note 2 supra.

make any agreement to sacrifice his life or suffer injury to his person, and any such agreement is void.<sup>50</sup>

In those states in which there is no penal provision prohibiting a sterilization operation by the modern methods, the general rule of tort law would seem to apply and the consent of the party to submit to the operation should be a complete shield against civil liability on the part of the operating physician, provided the operation was performed without negligence.<sup>51</sup>

The appellate courts record accounts of a number of operations where the patient was rendered sterile by unauthorized liberties taken by the physician.<sup>52</sup> The leading English case is that of *Beatty v. Cullingworth*.<sup>53</sup> A double ovariectomy operation was performed upon the plaintiff against her express instructions. She was a single woman, engaged to be married, and when she heard that the double operation had been performed rendering her incapable of reproducing, she broke her engagement, and sued the doctor. The court practically instructed the jury to bring in a verdict for the defendant. The case has been most severely criticized.<sup>54</sup> In a similar case in this country,<sup>55</sup> the plaintiff recovered on an instruction that if the operation performed was different from the one consented to, there could be a recovery. Where no consent is found, the legal problem is not difficult, for as was early laid down, even though consent may be found from circumstances, nevertheless, if an operation is performed upon a person without the patient's consent, express or implied, it is unlawful.<sup>56</sup>

We have still another class of cases, in which the patient has submitted to the operation, but, it is contended, is incapable of giving legal consent; as in the case of a minor or married woman where the consent of the parent or guardian or spouse was not secured. Let us suppose that a woman, in order to remove the dread of pregnancy, goes to a physician and is sterilized without notifying her husband. When the husband learns that the possibility of heirship has been cut off, he brings suit against the doctor. The few cases that have directly considered the point as to the necessity of obtaining the husband's consent<sup>57</sup> agree that if the wife's consent is obtained the consent of the husband is not necessary, provided that she is capable of giving such consent.<sup>58</sup> However, two cases<sup>59</sup> apparently assuming that the husband's consent is necessary, hold that by placing the wife in the physician's care, a husband impliedly consents to such operations as may be found necessary or expedient. No case has been found which questions the right of the husband to have an operation performed upon himself without the consent of his wife, and it is difficult to imagine upon what theory such a right could be contested.

The recent emancipation of woman has rendered the husband less a "head" of the home than he

was in years past, but certainly it has not reached the point of making him less than her equal in contemplation of law, and if the husband's consent is not necessary for an operation on the wife, her consent should not be necessary for an operation upon him.

Suppose that a boy or girl in the early teens visits a physician and solicits him to perform an operation, and the physician does so all unknown to the patient's parents who might have been easily notified. The operation is performed with due care. The child, the only male child, has been sterilized, and the father or child, through the father, brings suit against the doctor. The cases would seem to indicate that recovery will be granted independent of negligence where the parent's consent was not obtained<sup>60</sup> unless the factual situation presents a clear case of emergency<sup>61</sup> or, in some cases at least, the operation could be deemed a necessity under the laws of the state allowing minors to contract for necessities.<sup>62</sup> This general requirement of consent is based on the theory that an operation given without consent is an assault, and that a minor like an incompetent, can only give consent through his parent or guardian.<sup>63</sup> In this enlightened age the obvious difference between the case of the married woman and the case of the minor needs little explanation.<sup>64</sup>

Suppose before marriage a wife is sterilized by a private operation, and does not disclose the fact to her husband at the time of the marriage. He petitions for an annulment on the ground of fraud in the marriage contract. In the only case which can be found in point<sup>65</sup> the court granted the annulment on the ground of fraud, saying:

"Some women are congenitally, and others traumatically barren. The former may never discover the fact until after a fruitless marriage. But when a woman knows that she has been made barren by a surgical operation she is under a legal duty to disclose the fact to an intended husband, so that, if he then marries her, he will be consenting to the situation that will frustrate his natural hope of posterity, and he would not be heard to repudiate the marriage, which his conduct has rendered unavoidable, although if his knowledge had been acquired subsequent to the ceremony he could have avoided it."

Suppose the sterilization operation were performed the day following the marriage. This would not constitute a ground for divorce even in those states which recognize merely impotency as a ground, for as has been pointed out,<sup>66</sup> impotency imports a total want of the power of copulation and only as necessarily incident thereto a want of concupiscent power.

With the rapidly increasing interest in this general subject and the great prevalence of sterilization operations we may well expect that more of these problems will soon find their way into the courts. In the meantime, this brief analysis is offered to suggest the nature of the liability of physicians working in this field.

50. American Law Institute. Restatement of Torts, No. 1, Sec. 75.

51. See note 40 supra.

52. *Beatty v. Cullingworth*, an unreported case tried before the Queens Bench Division 1896. See note 53.

53. 44 Central Law. J. 158 (1897).

54. *Cuthriel v. Protestant Hospital*, an unreported Ohio case, cited in the notes to *Kinkaid on Torts*, Sec. 375.

55. See note 39 supra.

56. *Burroughs v. Crichton*, 46 App. (D. C.) 596, 602, 4 A. L. R. 1529 (1919) and note, 1631; *Jannet v. Housekeeper*, 70 Md. 162, 170, 14 Am. St. Rep. 340, 2 L. R. A. 587 (1889).

57. *Pratt v. Davis*, note 40 supra. *Burroughs v. Crichton*, note 37 supra.

58. *McClallan v. Adams*, 19 Pick. (Mass.) 232, 31 Am. Dec. 140 (1837); *Pratt v. Davis*, Note 40 supra.

59. *Moss v. Rishworth*, 191 S. W. 843 (Tex. 1917), affirmed 222 S. W. 225 (1920). See *Browning v. Hoffman*, 90 W. Va. 568, 111 S. E. 492 (1922).

60. *Luka v. Lowrie*, 170 Mich. 122, 136 N. W. 1106, 41 L. R. A. (NS) 290 (1912) at 135. See also *Browning v. Hoffman*, nt 59 supra.

61. *Bishop v. Shurley*, 211 N. W. 78, (Mich. 1926).

62. *Moss v. Rishworth*, Note 59 supra.

63. See *Burroughs v. Crichton*, supra note 48, and comment at 4 A. L. R. 1533.

64. *Turner v. Avery*, 92 N. J. Eq. 473, 113 Atl. 710 (1921).

65. See note 20 supra.



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### *Washington Letter\**

ON January 23, 1930, the President signed the so-called "Extension Act," granting to the Secretary of the Interior the power to extend the life of oil and gas prospecting permits on the public domain, for an additional three-year period. The law is designated Public No. 35—71st Congress. This legislation is very much welcomed by the public land states, to which it has particular application.

Hearings were commenced before the sub-committee on Insurance and Banking of the District of Columbia Committee of the House of Representatives on January 30, 1930, on the Gibson Bill, H. R. 3941, providing a new and comprehensive insurance code for the District of Columbia. The Chairman of the Committee on Insurance Laws of the American Bar Association, Mr. William Bro-smith, appeared as a witness.

Hearings were scheduled to begin before the Committee on the Judiciary of the House of Representatives on February 12, 1930, on seven measures for the repeal of the Eighteenth Amendment to the Federal Constitution. The Chairman, Representative Graham, announced that all who desired would be given opportunity to testify relating to the measures under consideration.

On February 6, 1930, a further hearing was held by the sub-committee No. 2 of the House Committee on the Judiciary, on the following bills to provide for procedure in the trial of certain crim-

inal cases before the District Courts of the United States and to increase the power of the United States Commissioners:

H. R. 1809, introduced by Mr. Moore of Virginia.

H. R. 3139, introduced by Mr. Glover.

H. R. 8579, introduced by Mr. McKeown.

H. R. 8756, introduced by Mr. Barbour.

Also on the following bills to amend the national prohibition act and provide for summary prosecutions:

H. R. 8913, introduced by Mr. Christopherson.

H. R. 8914, also introduced by Mr. Christopherson.

On January 17, 1930, hearing was held before a sub-committee of the House Committee on the Judiciary on House Bill 5568, introduced by Mr. Cramton, to establish uniform requirements affecting Government contracts, and for other purposes.

On January 20, 1930, the declaratory judgment bill, introduced by Mr. Montague (H. R. 23) was objected to on the floor of the House of Representatives and stricken from the consent calendar. The bill had been previously reported favorably from the House Judiciary Committee.

On December 16, 1929, the House of Representatives passed H. R. 972, introduced by Representative Graham, to amend an act entitled "An act providing for the revision and printing of the index to the Federal Statutes," approved March 3, 1927. The bill was referred to the Senate Judiciary Committee on the following day.

The House of Representatives, on January 22, 1930, passed House Bill No. 7587, introduced by Representative Graham, to authorize the appointment of reporters in the courts of the United States and to fix their duties and compensation. The bill was referred to the Senate Judiciary Committee on the following day.

On February 5, 1930, the House of Representatives took up for consideration, bills on which the House Judiciary Committee had reported, and the following bills were passed:

H. R. 119, being a bill to prohibit the sending and receipt of stolen property through interstate and foreign commerce, with amendment.

(Hon. J. Weston Allen, of the American Bar Association, appeared before the Committee on the Judiciary of the House of Representatives on a prior date, indorsing the bill.)

H. R. 980, to permit the United States to be made a party defendant in certain cases for the removal of liens or claims of the United States on real estate, with amendments.

The Senate Judiciary Committee, on January 20, 1930, referred to a sub-committee, composed of Senators Steiwer, Hebert and Overmann, the bill (Senate 50) to provide procedure before United States Commissioners for offenses against prohibition laws.

The Senate Judiciary Committee will doubtless take up the pending bills introduced in the Senate, and those referred to the Committee after having passed the House of Representatives, shortly after the Tariff Bill is enacted into law.

\*This letter will be a regular feature of the Journal. It will deal principally with news of the progress in Congress of measures in which the Bar is interested.

## COMMON SENSE VERSUS PROFUNDITY IN JUDICIAL DECISIONS

Study of Decisions of Federal Judiciary, from District Courts to Supreme Court, Reveals Extraordinary Common Sense Which Jurists Have Used in Straightening Out Procedural Snarls, Ignoring Precedent and Making New Rules to Meet New Conditions—Specific Illustrations

BY JOHN EVARTS TRACY

*Member of the Chicago Bar*

AS a text for these remarks may be taken the following language from the trenchant pen of the late Judge Lamm, of the Missouri Supreme Court:

"I hold this doctrine to be self-evident, viz: One of the inherent powers of a court of equity is the right to act with good sense."

During the past few years some work done by the writer, involving questions of equity practice, has compelled him to make a rather thorough study of the decisions of our federal judiciary, the Supreme Court, the various Circuit Courts of Appeals and the Circuit and District Courts. As these decisions are read, one becomes aroused to a new admiration for the great jurists by whom they were rendered, not only for the wisdom and learning therein shown, but for the extraordinary common-sense which such jurists have exercised, in straightening procedural snarls which have blocked other courts for generations past, in ignoring precedent (and sometimes apparently ignoring logic) in order to attain the ends of justice, and in making new rules to meet new or changed conditions. In many cases the greatest minds have been the broadest and the most practical.

As are the rulings of every body of jurists, the decisions have not been uniform, either in the learning displayed in the opinions written, or in the ability of the judges to handle difficult problems in a practical manner, and one would almost, at times, form an opinion that breadth of view and common sense application of rules of procedure are confined to certain judicial circuits. An explanation of this, however, may be found in the fact that in certain circuits the federal judiciary have mainly been chosen from the bars of states where the local practice has always been unduly technical and where such judges, as lawyers, have been reared in an atmosphere of distinguishment between Tweedledum and Tweedledee.

In all circuits there have been great and learned judges, but the circuits where the decisions appear to have shown the greatest breadth of view in applying the use of the "good sense" recommended by Judge Lamm, are the Sixth and the Eighth, where have sat such judges as Brewer, Sanborn, Thayer, Caldwell, Taft, Lurton and Denison. Some years ago an enterprising young lawyer in Wisconsin did a great service to the bar by compiling in one volume the reported decisions of the

two great chief justices of that state, Dixon and Ryan. If any lawyer now wishes to do a similar service to the profession, the suggestion is made that he collate the decisions of Judges (later Justices) Taft and Lurton, when sitting as trial judges or in the Circuit Court of Appeals of the Sixth Circuit. Great as the achievements of our present chief justice have been in other lines, his greatest work, in the opinion of many lawyers, was his clarifying of the law on many knotty points when sitting as circuit judge, and anyone who has studied the decisions of Judge Lurton, when sitting on the circuit bench, will well understand how certain it would have been that he would be the man selected, when Justice of the Supreme Court, to head the work of preparing a practical, common sense and simple code of procedure, as expressed in the new federal equity rules.

Readers may say, however, that it is all right to speak glittering generalities as to the wisdom of the federal judiciary but that they will appreciate a specific example of what is here meant by a "common sense" decision, as distinguished from one which is "profound." Here are a few such examples:

1. A corporation having abundant assets, much in excess of its liabilities, if properly conserved, is confronted with a situation where it is not able to meet its immediately pressing obligations. It may have run into a period of surplus production, so that it is not able quickly to market its large inventory of finished products. It may have suffered from a defalcation or a bank failure. Certain creditors may have brought suit to collect their debts, which suits will result in judgments, levies and resulting preferences to creditors, or will result in bankruptcy proceedings taken to avoid or to set aside such preferences. The one hope of saving the situation, for the benefit of general creditors as well as of stockholders, is to have a brief moratorium, during which time the company may get its affairs in shape, either for reorganization or for an orderly liquidation. The only way to obtain such moratorium is to have the property of the company taken under the protecting wing of some court. But now, under the long established theories of equity practice, can that result be accomplished? In no state system of judicial procedure, in the knowledge of the writer, is there a sufficient remedy in such a situation; for the result desired can be achieved only through a receiver-

1. *State vs. Shelton*, 238 Mo. 281, 142 S.W. 417.

ship; the law is fixed as thoroughly as that of the Medes and Persians that a receiver can be appointed only as ancillary to other relief; and where, in such a situation, is there any recognized cause of action, showing ground for equity relief, to which the appointment of a receiver could be ancillary.

The federal courts, however, have not, when confronted with such a case, been daunted by lack of a recognized remedy. Ignoring the long established rule that the appointment of a receiver must be ancillary, they have authorized the appointment of a receiver in such a situation, if the defendant consents thereto, merely on an allegation that a receiver is needed. Whether, in so doing, they have overruled the old theory that the appointment of a receiver can only be ancillary to other relief prayed or whether they have upheld that theory and have added a new principal cause of action, the conservation and protection of the property of a solvent corporation while its affairs are being reorganized, so that the appointment of a receiver is still ancillary, is immaterial. It is sufficient to say that they have met and solved a difficult problem in a common sense way; that they have worked out a procedure which no state judiciary has so far dared to follow; and that the results have been most beneficial to all concerned, the corporation, its stockholders and its creditors. Notwithstanding that much criticism has been directed against the federal courts for their usurpation of such authority to appoint receivers over corporations and that certain ills have attended such practice, the proof of the necessity for and the value of such procedure is its continued existence and use, without opposition from the class of persons most interested—the unsecured creditors of the corporation. If you ask today a credit man of any bank or wholesale house whether he would prefer the abolition, by statute, of such usurped jurisdiction, leaving the alternatives of preferences among creditors through levies under execution or of avoidance of preferences through bankruptcy proceedings, your reply will be an emphatic negative.<sup>3</sup>

2. The rule has always been and still is, in many jurisdictions, that a receiver cannot bring suit in his own name to recover moneys owing to or properties belonging to the receivership estate, but that such suit can only be brought in the name of the corporation for whose property the receiver has been appointed. Such rule is altogether logical, for a receiver has no title to property, but only the custodianship of the same. Logical, however, as the rule may be, the circumlocution is absurd, for as a practical matter the receiver is the one who sues and the corporation has nothing to do with it. Certain legislatures, seeing the absurdity, have proceeded to remedy it by statute. A case came before the Supreme Court of the United States where a receiver had sued in his own name and the court was claimed to have been without jurisdiction to entertain the suit. The court might well have maintained its reverence for precedent and logic by saying, "We consider the rule impracticable but must observe it until Congress sees fit to change it by statute." Instead of so passing the responsi-

bility the court itself took the decisive step, saying, in effect, "This is an outworn technical rule of procedure which many legislatures have found it necessary to change by statute. What a legislature may do by statute we can do by judicial fiat. Here goes! A receiver may sue in his own name."<sup>4</sup>

3. A receiver is appointed, by a federal court, of a corporation with extensive business operations; for example, a railroad. The rule formerly was that such a receiver could not be sued without the consent of the court of his appointment. Congress, realizing the hardship and expense which the application of such a rule imposed on an ordinary small claimant, enacted a statute providing that suit may be brought against such a receiver without application or leave from the court of appointment.<sup>5</sup> The problem then arose as to just how much good this statute was to accomplish where a receiver was not available for service of process on him in the state or locality where the claimant resided. A receiver is an individual and, while there is abundant reason and precedent for serving process on the agent of a corporation, there is neither logic nor precedent for serving on the agent of an individual. The attorney for a poor litigant, apparently ignorant of the fact that jurisdiction of an individual can be obtained only by personal service of process on him, undertook to serve process on a station agent, in Indian Territory, of a railroad which was in the hands of a receiver, residing in and having his office in St. Louis. All that was needed, therefore, was for the counsel for the receiver to move to quash the service, which motion they made. The territorial judge refused to quash and, to the astonishment of such counsel, the judge was sustained in his illogical attitude by the Circuit Court of Appeals and by the Supreme Court, who held that it should be the rule that in a situation of this kind service is effective if made on the agent of the receiver on whom service might have been made had there been no receivership.<sup>6</sup> It can be agreed that such holding was bad, from the point of view of the logician, yet how necessary such a holding is, if justice to litigants is to be swift and not unduly expensive. It might be added that such a theory was considered entirely too heretical to be followed by the Court of Appeals of New York. In a similar case which came before that court, where the plaintiff had served a summons, both on the statutory agent for service appointed by the corporation and on an actual agent of the receivers, they gravely held that the service on the statutory agent was ineffective, for his agency had been revoked by the appointment of the receivers, and that the service on the actual agent of the receivers was ineffective because there was no showing that personal service in New York could not have been had on the receivers, notwithstanding that the facts showed that such receivers were appointed in and had their offices in Michigan.<sup>6</sup>

4. A judgment creditor, with execution returned unsatisfied, filed a creditor's bill in federal court against the corporation debtor to have a receiver appointed and the properties sold for the pay-

3. *Davis v. Gray*, 16 Wall 203, 21 L.Ed. 447.

4. Sec. 66 Judicial Code, U.S.C.Tit.28; Sec. 125.

5. *Eddy vs. LaFayette*, 49 Fed. 807, S.C. 163 U.S.456, 41 L.Ed. 325.

6. *Gursky vs. Blair*, 218 N.Y. 41, 112 N.E. 431.

2. For the reasonable basis of such rule see opinion of Judge Learned Hand in *Luhrig Collieries Co. v. Interstate Coal & Dock Co.* 281 Fed. 265.

ment of his debt. The court appointed a receiver and entered an order for the filing of claims. Many claimants filed. After the suit had been in the court for some time the defendant suddenly confessed judgment in favor of certain of its largest creditors who had not filed their claims in the receivership proceeding, deposited with the clerk of the court sufficient moneys to pay the claim of the judgment creditor who was plaintiff in the receivership suit and then moved to dismiss the suit, on the ground that the claim of the plaintiff was satisfied. The purpose of such move was evident. If the suit were dismissed the judgments so confessed would, by state statute, become a first lien on all of the real estate of the defendant and the holders thereof would have this preference over the other creditors. (This was when there was no bankruptcy act, so that a preference to a creditor once obtained was good). The move was a brilliant scheme to obtain a preference for certain creditors. Its logic was irresistible. It is elementary that a creditor's bill can be filed only for the purpose of collecting a judgment; the jurisdiction of the court cannot survive the satisfaction of the claim of the plaintiff and the defendant is entitled, as of right to the dismissal of the bill. The scheme was sound and would have succeeded in almost any court with a real reverence for precedent and logic. When it came before the United States Supreme Court, however, in the language of the street "They refused to fall for it." They neither dodged the issue nor distinguished the facts to make an artificial exception to a general rule of equity practice. They simply announced, in effect, that "The court having taken jurisdiction of the suit, under such circumstances, will retain it." And the whole well thought out scheme went for naught.<sup>7</sup>

5. One of the most difficult problems that embarrass the successful foreclosure of a corporate mortgage is that presented by a state statute permitting redemption from the sale at any time within a year thereafter. These statutes were adopted originally in pioneer communities to protect a new settler from a quick foreclosure and are not properly applicable to corporate mortgages securing bond issues. The difficulty is that in the case of a corporation with large business activities no one will bid at the foreclosure sale and tie up, for a year or more, large sums of money unless he knows that he is going to keep the property, and if one does purchase, he cannot, during the redemption period, safely invest money in repairs or improvements. Such question was presented to the United States Supreme Court, in a case where the lower court had refused to allow redemption from the foreclosure of a mortgage on a railroad property. The court held that the necessities of the situation demand that where a railroad property is mortgaged with its franchises it must be relieved from the operation of the redemption statute.<sup>8</sup> Such sensible rule has, since that decision, been generally applied as to mortgages on public utility properties and has been extended by some courts so as to also include cases of private corporations

where the business requires such continuity of ownership and management as to make it impossible to sell the property, subject to redemption, without seriously affecting the business and the sales value of the property. These instances include the case of a milk and creamery business, with established routes and contracts with farmers;<sup>9</sup> a beet sugar factory, where contracts must be made with producers in advance of the season;<sup>10</sup> and a packing and canning plant, whose operations were seasonal.<sup>11</sup> An Illinois judge, however, had in receivership in his court the properties of a coal mining company, which would seriously deteriorate in value unless the mines were worked and kept pumped out. If the property were sold subject to redemption the receiver could not pay pumping expenses unless he were able to obtain revenue by working the mine and he could not work the mine since his doing so would be taking away a portion of the property sold. The purchaser could not work the mine, as he would have no right of possession until the end of the redemption period. The defendant could not work the mine, as it was insolvent and could not pay its bills. Under these circumstances the judge could see no way out of the difficult situation other than to order a sale without redemption. The Appellate Court seemed to think that this was a reasonable view to take of the problem, but the Supreme Court reversed the decree, holding that the strict terms of the redemption statute must be observed, regardless of what might happen to the mine.<sup>12</sup>

"But," it may be said, "The above are only illustrations of the general enlightened attitude of modern courts toward justice. Can you give any instance of a decision rendered in modern times which appears to violate the rule of common sense?" Well, here are two examples, fixed in the writer's mind by a cursory reading of advance sheets and later restudied for the purposes of this discussion, one a decision by the Appellate Division of the Supreme Court of New York and the other by the Circuit Court of Appeals for the Seventh Circuit, both decisions having been rendered within the past few years.

1. At common law one suing for breach of contract was required to set out in his pleading the facts showing the manner in which he himself had performed the contract. When the New York Code was adopted the framers thereof undertook to obviate all this detailed recital of performance by permitting the pleader to make a general statement that he on his part had "duly performed" all the provisions of the contract to be performed by him. A pleader, suing for breach of contract who, evidently, was either not satisfied with the simplicity of the statutory statement or did not remember its exact language, stated in his complaint that the plaintiff had "performed the contract sued on fully and entirely, complying with all conditions on his part to be performed." The appellate division of the Supreme Court of New York, however,

7. *Brown, Bonnell & Co. vs. Lake Sup. Iron Co.* 134 U. S. 530; 33 L.Ed. 1021.

8. *Hammock vs. Farmers Loan & Trust Co.* 105 U. S. 77, 26 L.Ed. 1111.

9. *National Bank of Com. vs. Corliss*, 137 Mich. 435, 190 N. W. 717.

10. *Beet Growers Sugar Co. vs. Cal. Trust Co.* 3 Fed. (9d) 755.

11. *Pac. N. W. Packing Co. vs. Allen*, 116 Fed. 312.

12. *Locey Coal Mines Co. vs. C. W. & V. Coal Co.* 131, Ill. 9, 22 N. E. 503.

gravely held that this was not the same as saying that the plaintiff had "duly performed" the contract and that as the plaintiff had not either alleged the facts constituting performance or stated that he had "duly performed," the complaint was insufficient.<sup>13</sup>

2. A corporation, which had succeeded to the business of a copartnership of the same name, brought suit for breach of contract in the federal court for the Northern District of Illinois. The suit was brought within the prescribed period of limitations but some time elapsed before it came on to trial. On the trial the attorney for the plaintiff discovered that the contract sued upon had been in the name of the partnership and had been assigned to the plaintiff, with the other assets of the partnership, on the organization of the plaintiff, but after the default on the contract had occurred. The attorney, therefore, filed an amended declaration, setting out the contract and alleging the transfer to the plaintiff of all rights thereunder, to which amended declaration the defendant pleaded the statute of limitations, the breach of contract having occurred more than five years before the filing of the amended declaration. The action being at law the court was compelled to sustain the plea, under the Conformity Act; that

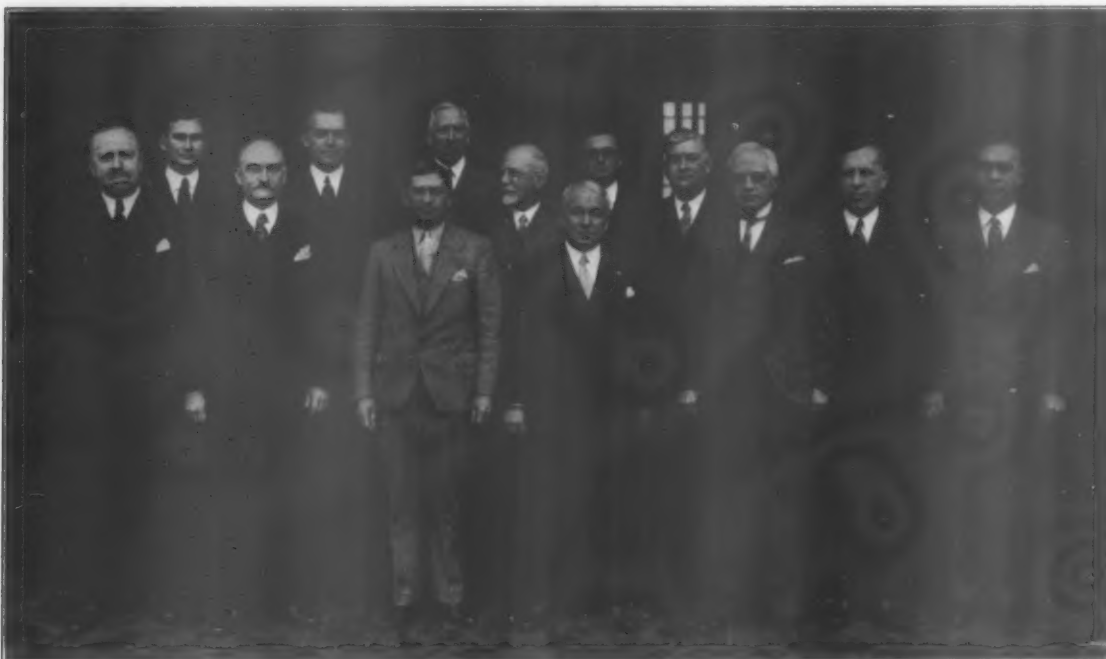
being the thoroughly established rule in the Supreme Court of Illinois.<sup>14</sup>

"But," it may be asked, "What is the purpose of this combined eulogy and diatribe?"

It may be answered that there are two purposes in the mind of the writer. First, to give vent to his feelings on the subject of decisions such as the two last mentioned (the necessity for the last, of course, being occasioned by the Conformity Act). Second, to suggest to the bar that for many years there has been pending before Congress a bill to authorize the Supreme Court to adopt rules of practice for law cases, as it has for cases in equity. The passage of that bill has been fought by some lawyers and by at least one determined senator on the argument that any rules so laid down by the Supreme Court would so complicate the practice as to make it unduly difficult for the state practitioner who has had little experience in federal courts. In view of its history of common sense and broadmindedness can it not be contemplated that what the Supreme Court would adopt, if given the power, would be a set of simple rules, on broad lines, which would enable any lawyer to plead his case according to its merits and to sustain his cause of action against technical attacks of learned and experienced opponents? Why not give the court a chance?

13. *Zaisa vs. George C. Heimerdinger Co.* 193 App. Div. 671, 184 N. Y. Supp. 335.

14. *N. & G. Taylor Co. vs. Anderson* 14 Fed. (2d) 353; affirmed, 275 U. S. 431.



Members of the Executive Committee of the American Bar Association in attendance at the mid-winter meeting at Grove Park Inn, Asheville, N. C., in January. From left to right: John H. Voorhees, Treasurer; Bruce W. Sanborn, President Henry Upson Sims, William P. MacCracken, Jr., Secretary, Thomas W. Davis, William B. Greenough, Edgar B. Tolman, Charles A. Boston, Judge Orie L. Phillips, Clarence E. Martin, Province M. Pogue, Ralph A. Van Orsdel, Guy A. Thompson.

## DEPARTMENT OF CURRENT LEGISLATION

### Criminal Statutes in 1929—Continued

BY JOSEPH P. CHAMBERLAIN

CONGRESS by the Hawes Cooper Act<sup>1</sup> has removed the ban which the state courts thought was implied in the Commerce Clause of the Constitution against state regulation of trade in convict-made goods which have entered the state from without. The Congress declares that convict-made goods from without a state may be treated like goods produced in the state. This statute does not go into effect till five years after its enactment, but the states are not awaiting the expiration of this statute of limitations. Oregon, Chapter 133, requires that goods made in whole or in part by convict labor outside the state must be labeled "permanently, plainly and legibly . . . 'these goods are convict made'" and must indicate the place of manufacture. The principle of regulation by publicity is further evident in the provision that advertisements of such goods must contain the same notification to readers "in type and/or letters conforming to those used in the general text of such periodical or publication." In addition to protecting the people against being deceived into the purchase of such goods the legislature has determined to protect their health against infections which may have developed in convict workshops, since it is further required that these goods must be properly disinfected according to the rules of the State Board of Health. Breach of the act is a misdemeanor. The Minnesota legislators, Chapter 138, modify somewhat the language of their webfoot brethren in requiring the brand on convict-made goods to read "prison-made" followed "in plain English" by the year of manufacture and the name of the penitentiary or other establishment in which made. They also change the character of the statute by applying it to goods made within their state or any other, and expressly forbid the removal, concealment or defacing of the brand. Both states have the same notion as to the degree of severity to be meted out to violators, declaring that they shall be misdemeanants.

The tendency towards severity which has already been noted, is very evident in Iowa, Chapter 265, which changes the formerly mild punishment for breaking jail from imprisonment in the jail which the prisoner found unsatisfactory, for not exceeding one year and a fine of not over \$300, to a modification accepting his judgment that the jail which he left was not suited to his needs, and directing that he should be imprisoned either in the state penitentiary or reformatory as for a felony. Indiana, Chapter 138, expressly omits minors convicted of an offense punishable by life imprisonment from the statute putting in the custody of the board of trustees of the state reformatory, minors convicted of crime. Idaho, Chapter 213, makes it a misdemeanor to deliver to or receive from a prisoner confined in

a jail, any letter or thing without the knowledge of the sheriff. Texas, Chapter 229, emphasizes the role of commutation of sentence in maintaining discipline in prisons. Amending a law which grants deduction of time from the sentence, for overtime work, the law makers add: "For each sustained charge of misconduct in violation of any rule known to the prisoner, all commutation earned by such overtime work shall be subject to complete forfeiture." Parole as a means of restoring convicted persons to ordinary social life depends on accurate information about the candidate for parole. Washington, Chapter 158, directs the district attorney to aid the Parole Board by sending with each convict a report containing all the information obtainable bearing on his past life and any other facts tending to throw light "upon the question whether such prisoner is capable of again becoming a good citizen." Connecticut, Chapter 285, in amending her suspension of sentence act, excludes from its benefits, prisoners who for a third time are convicted of a felony, or who are up for driving a motor vehicle when intoxicated within six years of a conviction for the same offense.

The case of the habitual criminal was given a new slant by Delaware, Chapter 246, by an amendment to the sterilization law which authorizes sterilization of any habitual or confirmed criminal convicted of at least three felonies by any court of any state or of the United States, if on examination it is found that mental abnormality was the cause of his criminality. The operation is not compulsory, but it may be ordered by the State Board of Charities on application of the governing body of the institution in which the person is confined, or the Board of Trustees of the State Hospital, if he is not in an institution. The same state, by Chapter 263, enforces a reasonable state monopoly of punishment, making it unlawful for a prisoner arrested by a private detective to be incarcerated in any place other than the jail or place provided by the public authority for such purpose. If, however, a private detective fails to obey the act his oversight is not to be regarded as very serious, since the punishment is merely a fine of between \$100 or \$500. Washington, by Chapter 26, evidently plans to make it easier for a convict to go straight on leaving prison, and facilitates his absorption into the mass of the population by providing that whenever the Governor pardons a person convicted of an infamous crime or such person secures an absolute release from prison as provided by law, his civil rights are restored to him, and adding that whenever the maximum term for which such person was sentenced is about to expire or has expired the Governor may by executive action restore to him his civil rights.

#### Instruments of Crime

Limitation of armaments, however difficult it

1. Extending State Jurisdiction by Act of Congress, A. B. A. Journal XV, p. 198.

may be to enforce in international relations, is being valorously attempted in the internal life of the country. Indiana, Chapter 203, prohibits manufacturing, selling or giving away, or using or operating or possessing any armored motor vehicle, except in the case of peace officers, banks, common carriers or persons engaged in transporting money, and members of the military forces on duty, and the mail service of the United States. The use of this important equipment of organized gangs is to be discouraged by imprisonment from five to twenty-one years. Three states, Pennsylvania, Chapter 329, Nebraska, Chapter 190, Missouri, page 170, attempt to limit to officers of the law, the use of machine guns. If other persons purchase, sell or have possession of these weapons they may be convicted of felony. Nebraska metes out different treatment to persons who sell or otherwise dispose of machine guns, who are merely misdemeanants, punishable by fine, and persons who have such weapons in their possession or transport them on a highway in the state, who are felons punishable by imprisonment of from one to ten years. Pennsylvania makes the limit of sentence at not more than five years for the ordinary case with a machine gun, but classifies the crime on a different basis from Nebraska by making a second classification of persons who commit a crime while armed with a machine gun for which they receive a sentence, in addition to that given for the crime committed, to imprisonment at not over ten years. Missouri makes no classification, but leaves it to the judge to classify the degree of guilt of possession or sale by establishing a minimum of two and a maximum of thirty years' imprisonment or a fine of not more than \$5,000, or both. Rhode Island, by Chapter 1421, enacts a new pistol act, permitting dealing in firearms concealable about the person, only by persons authorized by law, and making the usual requirement that a register be kept by such persons in which they must enter the particulars in respect of the purchaser and also in respect of the firearm disposed of, including its manufacturer's number or other mark of identification. A vendor must also require a person to produce a license for carrying a gun whose date and number must be entered on the register. The act does not apply to wholesale dealers, and it attempts to prevent bootlegging of pistols by making it a misdemeanor for a person lawfully in possession of a pistol to transfer it to another without notifying the licensing authorities.

#### New Crimes

The most colorful of the new criminal situations disclosed by an examination of the legislation of 1929 is contained in Chapter 386 of the Laws of California. Lured by the profits of the gambling houses of Tia Juana just over the line in Mexico, enterprising individuals set up floating temples to the Goddess of Chance in ships which kept positions just outside the three-mile limit in the Pacific which marks the boundary of the state and the boundary of the international jurisdiction of the United States. These vessels are under foreign flags and the problem before the legislature was how to effectively cripple their operations. The answer, in Chapter 386, makes it a misdemeanor to procure or solicit a person to visit a gambling ship, whether or not in the jurisdiction of the state, or to solicit a person to enter a boat used as a means of reaching the ship, and furthermore, visits the same penalty upon those

who transport a person to a gambling ship. So the state hopes to cut off the supply of lambs to the shearing shed and thus render ineffective the elaborate preparations of the would-be shearers.

A very serious situation is met by five states which have legislated against the use of bombs or explosives used to injure persons or property. Oregon, Chapter 408, Missouri, page 165, make the first approach to the prohibition of bombing by punishing persons who set off bombs or other devices charged with explosives. Pennsylvania, Chapter 330, and Kansas, Chapter 171, take the next logical step by punishing persons who have bombs in their possession, or who attempt to use explosives for the injury of persons or property, and Kansas adds to its index of forbidden acts the placing of bombs on or about the person of another without his consent. This act would by its words apply to a police officer who "plants" a bomb on a suspected person as a basis for criminal charge. The Kansas legislature is somewhat tender, since it makes the crime only a misdemeanor, but the solons of the Keystone state declare practically the same act to be a felony with a term of not less than two years or more than ten in the penitentiary. Perhaps the population of Pennsylvania is in greater need of protection from the bomber than that of Kansas. The Missouri and Oregon laws made actual bombing a felony, but again the western state is less severe, since the minimum is one year, while the Missourian who bombs gets not less than two years. The Kansas legislature is evidently anxious to get convictions, since it makes possession of bombs *prima facie* evidence of an intent to make an unlawful use of them. Maryland, by Chapter 405, adds dwellings to the buildings which it is a felony to destroy or injure with dynamite.

Society has not wearied of its efforts to discourage the ancient crimes of burglary and robbery. The influence of the machine age is very apparent in this, as it is in other branches of criminal legislation, notably in the stricture on the use of certain articles as instruments of crime. Most interesting of the adjustments of this sort is Nebraska, Chapter 74, which classifies as burglary with explosives, burglary in which electricity or gas is used for the purpose of breaking into and entering buildings, for the purpose of appropriating articles found therein to the personal uses of the ingenious worker. Maine, Chapter 244, makes burglary with explosives a serious matter by fixing the minimum punishment at twenty and the maximum at forty years. Bank robberies are very severely treated by Chapter 61 of New Mexico which makes the maximum penalty for the offense fifty years, and adds that if the crime is committed by a person who exhibits or uses a firearm or other deadly weapon, such person must suffer the punishment of life imprisonment. As far as the average individual is concerned, the difference between a maximum conviction of fifty years and life sentence is not substantial, but it is worth while here insisting again on the circumstance that in case of a plain bank robbery the judge is given a very wide latitude, but in the second case he is given none. Ohio, Page 502, agrees with New Mexico that a person who enters a bank with intent to commit a felony armed with firearms or deadly weapons has proved his incompatibility with society and should be given a life sentence. A Buckeye bank robber, however, has the chance of getting not

less than twenty years in the penitentiary if the jury recommends mercy. Evidently the estimate of the judge on the desirability of a shorter term is not considered worth paying attention to. The use of dangerous weapons in committing a felony as a separate offense is enacted in North Carolina, Chapter 187, Florida, Chapter 14501, Wyoming, Chapter 20, Indiana, Chapter 55, with penalties varying from a maximum of fifty years in Wyoming; thirty in North Carolina; twenty in Indiana; to ten in Florida. The minimums also show an interesting variation from five years in Wyoming and North Carolina to ten years in Indiana, and no minimum in Florida.

The use of weapons also changes the degree of the crime of resisting an officer in Indiana, where, by Chapter 101, mere interference with an officer is made a misdemeanor, but if in the course of that interference a dangerous weapon is used, the punishment shall be for a fixed term of one year and the same penalty is edicted for a person who inflicts a bodily injury on a police officer during interference with him while he is arresting or attempting to arrest any person.

Three Rocky Mountain states unite in punishing the specific crime of injuring or destroying telephone or telegraph wires or tapping such wires. In every case the punishment is a misdemeanor. The three states are Colorado, Chapter 84, Montana, Chapter 66, and New Mexico, Chapter 52. Slander becomes a statutory crime in Oklahoma by Chapter 21, so that it is a misdemeanor to repeat or scatter false rumors or reports of a slanderous or harmful nature concerning any person or persons. Minnesota, Chapter 212, adopts the not uncommon statute specifically punishing the spreading of rumors of the probable insolvency of a bank. More 20th Century is Chapter 117, of North Dakota which imposes a fine of not over \$100 on any person who shall falsely utter words "over, through or by means of what is commonly known as radio, which in their common acceptance shall tend to blacken the memory of one who is dead or impeach the integrity or virtue or publish the natural defects of one who is alive and thereby expose such person to public hatred or ridicule or financial injury." The truth, however, is a "safe defense in all prosecutions for slander." This statute may tend to hold down fiery orators on the stump who are addressing an unseen as well as a visible audience.

The usual standards by which punishment for theft is measured, are the value of the property taken, the method by which it was taken or the means used in taking; but a small group of statutes applies a practical yardstick, the economic importance of the interest to be guarded and the ease with which the property protected can be stolen. Texas, by Chapter 108, declares that "the raising and marketing" of poultry has become a great industry and stealing of fowls frequent, so the legislature was moved to make such stealing a felony, but allows the judge to distinguish between what the Jones Law<sup>2</sup> would term "casual or slight violations," and a "commercialized violation" of the right of property in fowls. He may sentence to jail for not over one hundred days, or send an habitual or commercial chicken thief to the penitentiary for not over two years. As there is no minimum the judge can fit the punishment to the locality and the individual.

In Wyoming, Chapter 147 expressly includes turkeys among livestock the theft of which is a felony subject to a penalty of from one to ten years. Probably market reports would show Wyoming as an important contributor to Thanksgiving dinners. The convenience of wholesale misappropriation of turkeys in trucks is perhaps another motive for making the punishment so severe. Minnesota, Chapter 203, fixes a minimum of forty days' imprisonment in a county jail for theft of domestic animals and allows the maximum punishment still to apply; while Idaho, Chapter 105, has considered it necessary to take care of the interests of a new form of animal husbandry by making it a misdemeanor to trespass in the vicinity of enclosures where foxes or other fur-bearing animals are kept.

Another interesting use of the *prima facie* evidence principle occurs in Michigan, No. 186, which punishes as a felony the unlawful appropriation to his own use of money or property worth upwards of \$50 by a public officer. The failure of an officer to turn over to a successor all money and property coming officially into his possession is to be *prima facie* evidence of an offense against the provisions of the act. California, Chapter 553, also is concerned with public officers and makes the offering of a bribe to a state employee a misdemeanor, while on the other hand it declares an agreement to receive a bribe an equal offense to receiving one. Connecticut, Chapter 227, to protect the public finance, expressly makes it a misdemeanor for an accountant appointed by a town to investigate its finances to include knowingly any false statement or intentionally to suppress or conceal the truth in respect of such finances. Another method of protecting both the finances of a city and the interests of the purchasers of bonds is contained in Washington, Chapter 212, which makes it a felony for any person, firm or corporation engaged in printing bonds of a certain class to print a greater number than that specified in the order or more than one bond of the same number. Pennsylvania, Chapter 226, deserves attention. It makes embezzlement any action of an officer or employee of a bank for the benefit of himself, or of the corporation, or of any corporation, with the intent to defraud or injure his institution or to deceive a bank examiner. Interesting for the evidence necessary, as well as in itself, is California, Chapter 303, which punishes with from one to five years, or a fine of not more than \$500, a person who solicits another to offer or accept a bribe or to join in the commission of certain serious offenses, including murder and subornation of perjury. The offense must be proved by the testimony of two witnesses or of one witness with corroborating circumstances, so that no single person is sufficient state's evidence to secure conviction for this offense.

#### Procedure

Idaho, Chapter 72, permits the district attorney to amend an indictment or information without leave of the court at any time before defendant pleads, and thereafter, "in the discretion of the court" where the change is "without prejudice to the substantial rights of the defendant." No amendment is permitted which charges an offense other

(Continued on page 178)

2. A. B. A. Journal, May, 1929, p. 276.

## AMERICAN BAR ASSOCIATION JOURNAL

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JOSEPH R. TAYLOR, MANAGER

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### TWO GREAT PUBLIC SERVANTS

Chief Justice Taft's retirement from the high position he has so ably filled is a cause of universal regret. He possessed in an eminent degree the confidence of the Bar and the nation; and that confidence was more than justified by his administration of his important office.

He takes with him the good wishes and affection of his fellow-countrymen. They trust that, relieved of the exacting burdens of the Chief-Justiceship, he may be fully restored to health and may long continue to enjoy the blessings of this life and the evidences of the affectionate esteem in which he is held by all. He leaves behind him the fruits of years of labor and influence for the improvement of the Federal Administration of Justice. The impulse given during his incumbency will gather increased momentum as the years go by.

But if the nation regrets the retirement of this eminent man, it may well congratulate itself that so worthy a successor was at hand. In the appointment of Charles Evans Hughes to the Chief-Justiceship President Hoover simply carried into the highest place the principles of selection which he has proclaimed for the whole Federal Judiciary. If Mr. Hughes could be induced to forego the advantages of an important and highly lucrative private practice, he was obviously the man for the place. No lawyer in the country within the range of availability has had such an extensive experience in large affairs. No man in public life, whether lawyer or not, has a more unblemished record for conscientious and brilliant devotion to the public

service, and that often at the cost of great personal sacrifice. Mr. William D. Guthrie undoubtedly expressed the general opinion of his professional brethren in an address at a banquet tendered Mr. Hughes by the Bronx County Bar Association in 1929:

"We thus have nearly a quarter of a century of great opportunities fortunately and happily arising for varied patriotic services, all of which opportunities were competently, brilliantly and successfully availed of. These opportunities came not by chance, but because of the recognition of exceptional abilities, and each was fruitful of great works because of Mr. Hughes' preparedness, industry and competency, indeed genius, for the various services that the opportunities called for.

"There is a truly moral grandeur and inspiring loftiness in this spirit of unselfish patriotic service that I cannot find words adequately to extol; but as a lawyer I am very proud and very grateful that we find it in so preeminent a degree in a member of our own profession. Mr. Hughes' career will long symbolize the highest and most cherished standards and traditions of the American Bar and the best product developed by American institutions. His life and his magnetic and outstanding personality should ever remind and admonish us what manner of man an American lawyer should strive to be."

In accepting the appointment Mr. Hughes embarks anew upon a career of distinguished public service. That he will measure up to the responsibilities of his great office, no one doubts. It is a source of satisfaction to his brethren of the Bar that this highest honor that can come to the lawyer in the course of his professional career has found so able and so fit a recipient.

### JUDICIAL COUNCILS AND THE RULE-MAKING POWER

The last annual report of the Rhode Island Judicial Council bears significant testimony to the importance of a restoration of the rule-making power to the courts, in the opinion of those who have given the subject careful study. The entire report—a digest of which was printed in the February issue of the JOURNAL—is devoted to this single subject.

The Council expresses the unqualified opinion that "all matters of judicial proced-

ure should be regulated by the courts, which are the constitutional instruments for the Administration of Justice." As to the inherent right of the courts to make rules for the transaction of their own business, as do the executive and legislative departments, the theoretical and historical discussion in the report leaves small doubt. But the Council frankly faces the fact that this right has long been divided with the legislature and it proposes a sensible and diplomatic method of securing the exercise of the full power by the courts without raising a contest with the legislative department. In brief, it proposes that the legislature by act restore the full and undivided rule-making power to the courts.

The legislature of Rhode Island has already shown its appreciation of the work of the Council by adopting all of the recommendations, save one, of its two previous annual reports. A careful consideration of the problem of the improvement of the administration of Justice in the state should unquestionably lead it to see the propriety of adopting this further and most important suggestion. The restoration of the rule-making power lies at the base of any plan for the efficient functioning of the courts. The arguments in its favor are too well known to readers of the JOURNAL to be repeated here; and the Council may be relied upon to furnish them to members of the legislature who are interested in the general movement to make justice speedier and more efficient.

But while the Rhode Island Council is the latest to take action in favor of the restoration of the rule-making power, it is by no means the only Council that has recognized and affirmed the extreme importance of the step. A number of other Councils have made similar recommendations. The Connecticut Judicial Council, for instance, in 1928 proposed an Act giving the Supreme and Superior Courts power to make rules concerning appellate procedure. The Judicial Council of Cook County, Ill., last year recommended an act conferring power upon the Supreme Court to adopt rules for the regulation of procedure in court cases. The North Carolina Judicial Conference recommended an act conferring the rule-making power in 1929. These are only a few illustrations of the fact that Judicial Councils, as bodies of experts, are naturally and in-

evitably taking up the question and urging a modern, practical viewpoint upon legislatures.

No reader of the JOURNAL is likely to be in any doubt as to the views editorially entertained on this subject: The JOURNAL maintains that the right to regulate their own procedure is inherent in the courts, that the legislative department has no right to intrude into the field of the Judicial Department, and that the courts may and should resume and exercise their ancient powers. It also recognizes the fact that the exercise of the right, and not its mere assertion, is the end to be attained; that in certain states, as a matter of practical expediency, the best way to deal with the matter is by legislative action which shall restore this power to the courts and thus terminate further usurpation into the judicial field. This is evidently the view of the members of the Judicial Council of Rhode Island as well as of some other states.

It is to be hoped that success will attend their efforts. Certainly they will go before the legislature with a prestige and influence that few other organizations can boast. In the first place, they are generally a legislative creation themselves, and most parents are inclined to favor their own children. Secondly, the discussion preceding their creation has tended to familiarize legislators with the need for improvements. Thirdly, few legislators will question the ability of the members or the sincerity or impartiality of their recommendations; in a word, they will not be suspected of having an axe to grind. Fourthly, the fact that the recommendation comes from a specially constituted body is likely to overcome the natural legislative inertia in matters of improvement and actually focus attention on the real merits of the proposal. The Judicial Councils are to be congratulated that they are seeing and seizing this important opportunity.

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A meeting of the Directors of the American Judicature Society will be held on May 7 at 2.00 p. m. in the Mayflower Hotel, Washington. The meeting will be for the discussion generally of reform in the administration of justice and of the methods to be employed by the Society. Members of the Society are also invited to attend. The afternoon session will be followed by a dinner which will adjourn before the reception held by the American Law Institute.

# REVIEW OF RECENT SUPREME COURT DECISIONS

What Constitutes a Fair Return on Capital Invested in Street Railway—Allowances for Depreciation Should Be Based on Present Value—Fourteenth Amendment Forbids State to Impose Inheritance Tax on Transfer of Its Bonds and Certificates Under Certain Circumstances—New Jersey Statute Imposing License Tax on Concerns Using Streets or Other Public Places Held to Impose Burden on Interstate Commerce—What Constitutes Lessening Competition in Meaning of Clayton Act?—Seizure of Property of Absconding Husband—Other Cases

BY EDGAR BRONSON TOLMAN\*

## Street Railways—Fair Return on Valuation— Allowance for Depreciation

In determining what constitutes a fair return on capital invested in a street railway, allowance should be made for payment of operating expenses, interest, reasonable dividends and for some addition to surplus account. A rate of return permitting less than this is insufficient to maintain credit and to acquire necessary capital. The rate of return should be equal to the return generally on capital invested in other enterprises involving corresponding risks and uncertainties.

Allowances for depreciation should be based upon the present value of the property and not on the cost thereof.

*United Railways and Electric Company of Baltimore v. West et al.*, Adv. Op. 148; Sup. Ct. Rep. Vol. 50, p. 123. (Two cases.)

In these cases the Court considered a controversy regarding the fixing of rates sufficient to permit a fair return on the investment of a street railway company. The dispute related to two questions: the rate of return sufficient to avoid confiscation and the method of computing depreciation.

The relevant facts involved were not in dispute, so far as necessary to dispose of the controversy. It appeared that the railway company operated street cars in the City of Baltimore and that its properties had a present value of \$75,000,000. This included \$5,000,000 as the value of easements in the city streets, held to be an interest in real estate under local law. (Objection to the inclusion of the value of these easements was disregarded because made too late.) The capital structure of the company consisted of \$24,000,000 of common stock, \$38,000,000 of ordinary bonds, and \$14,000,000 of perpetual income bonds.

Due to the use of automobiles the total number of passengers carried has decreased. During "rush hours" the number has increased, however. This has necessitated an increase in expenses in proportion to passengers carried, because equipment and operating forces must be maintained at such standard as will accommodate the public during the rush hours.

The state court of first instance, at the suit of the company, made an order enjoining as confiscatory a rate of fare permitting a return of 6.26 per cent on the valuation of \$75,000,000. It ruled also that the commission erroneously had made an allowance for depreciation on the basis of cost, rather than on the basis of present value of depreciable property. The

state court of appeals sustained this latter ruling as to computing depreciation allowance, but reversed the ruling that the rates were confiscatory. On appeal the Supreme Court sustained both contentions of the railway company in an opinion delivered by MR. JUSTICE SUTHERLAND.

With reference to what constitutes a fair return he observed that that question cannot be determined without regard to the present rate of return generally on capital and enterprise.

What may be a fair return for one may be inadequate for another, depending upon circumstances, locality and risk. The general rule recently has been stated in *Bluefield Co. v. Pub. Serv. Comm.*, 262 U. S. 679, 692-95:

"What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally. . . .

"Investors take into account the result of past operations, especially in recent years, when determining the terms upon which they will invest in such an undertaking. Low, uncertain or irregular income makes for low prices for the securities of the utility and higher rates of interest to be demanded by investors. The fact that the company may not insist as a matter of constitutional right that past losses be made up by rates to be applied in the present and future tends to weaken credit, and the fact that the utility is protected against being compelled to serve for confiscatory rates tends to support it. In this case the record shows that the rate of return has been low through a long period up to the time of the inquiry by the commission here involved."

What will constitute a fair return in a given case is not capable of exact mathematical demonstration. It is a matter more or less of approximation about which conclusions may differ.

The evidence was then reviewed relating to the return permitted under the rates fixed by the commission. In this connection it appeared that in order to attract capital or to compete in the money market the company, since 1920, had borrowed some \$18,000,-

\*Assisted by Mr. JAMES L. HOMIRE

000 at a rate of interest ranging well over 7 per cent. The returns obtained on the rates from 1920 to 1926 were a little above 5 per cent a year. This was thought clearly inadequate.

It is manifest that just compensation for a utility, requiring for efficient public service skillful and prudent management as well as use of the plant, and whose rates are subject to public regulation, is more than current interest on mere investment.

Sound business management requires that after paying all expenses of operation, setting aside the necessary sums for depreciation, payment of interest and reasonable dividends, there should still remain something to be passed to the surplus account; and a rate of return which does not admit of that being done is not sufficient to assure confidence in the financial soundness of the utility to maintain its credit and enable it to raise money necessary for the proper discharge of its public duties.

In view of these considerations a rate of  $7\frac{1}{2}$  or 8 per cent was thought necessary to avoid confiscation, and the rate order permitting a return of only 6.26 per cent was enjoined as confiscatory.

The method of computing depreciation was then considered. Holding that the state courts were right in declaring that the allowance for depreciation should be based upon present value and not upon cost, Mr. Justice Sutherland said:

One of the items of expense to be ascertained and deducted is the amount necessary to restore property worn out or impaired, so as continuously to maintain it as nearly as practicable at the same level of efficiency for the public service.

The amount set aside periodically for this purpose is the so-called depreciation allowance. Manifestly, this allowance cannot be limited by the original cost, because, if values have advanced, the allowance is not sufficient to maintain the level of efficiency. The utility "is entitled to see that from earnings the value of the property invested is kept unimpaired, so that at the end of any given term of years the original investment remains as it was at the beginning." *Knoxville v. Water Co.* 212 U. S. 1, 13-14.

This naturally calls for expenditures equal to the cost of the worn out equipment at the time of replacement; and this, for all practical purposes, means present value. It is the settled rule of this court that the rate base is present value, and it would be wholly illogical to adopt a different rule for depreciation.

As the Supreme Court of Michigan, in *Utilities Commission v. Telephone Co.*, 228 Mich. 658,666, has aptly said: "If the rate base is present fair value, then the depreciation base as to depreciable property is the same thing. There is no principle to sustain a holding that a utility may earn on the present fair value of its property devoted to public service, but that it must accept and the public must pay depreciation on book cost or investment cost regardless of present fair value. We repeat, the purpose of permitting a depreciation charge is to compensate the utility for property consumed in service, and the duty of the commission, guided by experience in rate making, is to spread this charge fairly over the years of the life of the property."

MR. JUSTICE HOLMES, MR. JUSTICE BRANDEIS, and MR. JUSTICE STONE dissented, the latter two delivering opinions.

MR. JUSTICE BRANDEIS first discussed the propriety of including the value of the easements in the streets, holding that on that question federal law is applicable and that thereunder they should be excluded.

Turning then to the mode of ascertaining allowance for depreciation MR. JUSTICE BRANDEIS entered upon a full discussion of his objections to the rule laid down in the majority opinion. He said, in part:

That the Court of Appeals erred in its decision becomes clear when the nature and purpose of the depreciation charge are analyzed and the methods of determining its proper amount are considered. The annual account of a street railway, or other business, is designed to show the profit or loss, and to acquaint those interested with the condition of the business. To be true, the account must reflect all the operating expenses incurred within the ac-

counting period. One of these is the wearing out of plant. Minor parts, which have short lives and are consumed wholly within the year are replaced as a part of current repairs. Larger plant units, unlike supplies, do not wear out within a single accounting period. They have varying service lives, some remaining useful for many years. Experience teaches that at the end of some period of time most of these units, too, will wear out physically or cease to be useful in the service. If the initial outlay for such units is entirely disregarded, the annual account will not reflect the true results of operation and the initial investment may be lost. If, on the other hand, this original expense is treated as part of the operating expenses of the year in which the plant unit was purchased, or was retired or replaced, the account again will not reflect the true results of operation. For operations in one year will then be burdened with an expense which is properly chargeable against a much longer period of use. Therefore, in ascertaining the profits of a year, it is generally deemed necessary to apportion to the operations of that year a part of the total expense incident to the wearing out of plant. This apportionment is commonly made by means of a depreciation charge.

It is urged by the Railways that if the base used in determining what is a fair return on the use of its property is the present value, then logically the base to be used in determining the depreciation charge—a charge for the consumption of plant in service—must also be the present value of the property consumed. Much that I said about valuation in *Southwestern Bell Tel. Co. v. Pub. Serv. Comm.*, 262 U. S. 276, 289 and *St. Louis & O'Fallon R. R. Co. v. United States*, 279 U. S. 461, 488 applies to the depreciation charge. But acceptance of the doctrine of *Smyth v. Ames* does not require that the depreciation charge be based on present value of plant. For, an annual depreciation charge is not a measure of the actual consumption of plant during the year. No such measure has yet been invented. There is no regularity in the development of depreciation. It does not proceed in accordance with any mathematical law. There is nothing in business experience, or in the training of experts, which enables man to say to what extent service life will be impaired by the operations of a single year, or of a series of years less than the service life.

The remaining portions of the opinion were devoted largely to an exposition of the development of the depreciation charge as an accounting device, and the practice of business men, officials and others, as illustrating its proper function and as indicative of the impropriety of computing it on the basis of present value of the property. For the details of this discussion the reader must be referred to the opinion itself.

MR. JUSTICE STONE then added the following:

I will assume, for present purposes, that as a result of *Smyth v. Ames*, 169 U. S. 466, the function of a depreciation account for rate making purposes must be taken to be the establishment of a fund for the replacement of plant rather than the restoration of cost or value of the original plant investment. But what amount annually carried to reserve will be sufficient to replace all the elements of a composite property purchased at various times, at varying price levels, as they wear out or become obsolete, is a question, not of law but of fact. It is a question which must be answered on the basis of a prediction of the salvage value of the obsolete elements, the character of the articles which will be selected to replace them when replacement is necessary, and their cost at the time of replacement.

Obviously, that question cannot be answered by a priori reasoning. Experience is our only guide, tempered by the consideration of such special or unusual facts and circumstances as would tend to modify the results of experience. Experience, which embraces the past fifteen years of high price levels, and the studies of experts, resulting in the universally accepted practice of accountants and business economists, as recounted in detail by Mr. Justice Brandeis, having demonstrated that depreciation reserve, calculated on the basis of cost, has proven to be the most trustworthy guide in determining the amount required to replace, at the end of their useful life, the constantly shifting elements of a property such as the present. Costs of renewals made during the present prolonged period of high prices and diminishing replacement costs tend to offset the higher cost of replacing articles purchased in periods of lower prices. I think that we should

be guided by that experience and practice in the absence of proof of any special circumstances showing that they are inapplicable to the particular situation with which we are now concerned.

Such proof, in the present case, is wanting. The only circumstance relied on for a different basis of depreciation, and one which is embraced in that experience, is the current high price level, which has raised the present reproduction value of the carrier's property, as a whole, above its cost. That, of course, might be a controlling consideration if we were dealing with present replacements or their present cost, instead of replacements to be made at various uncertain dates in the future, of articles purchased at different times in the past, at varying price levels. But I cannot say that since prices at the present moment are high, as a result of postwar inflation, a rate of return which is sufficient to yield 7.78 per cent on present reproduction value, after adequate depreciation based on cost of the carrier's property, is confiscatory because logic requires the prediction that the elements of petitioner's property cannot, in years to come, be renewed or replaced with adequate substitutes, at less than the present average reproduction cost of the entire property—and this in the face of the facts that the cost of replacements in the past fifteen years has been for the most part at higher price levels than at present, that the amount allowed by the Commission for depreciation has been in practice more than sufficient for all replacement requirements throughout the period of higher price levels, and that the Company has declared and paid dividends which were earned only if this depreciation reserve was adequate.

To say that the present price level is necessarily the true measure of future replacement cost is to substitute for a relevant fact which I should have thought ought to be established as are other facts, a rule of law which seems not to follow from *Smyth v. Ames*, and to be founded neither upon experience nor expert opinion and to be unworkable in practice. In the present case it can be applied only by disregarding evidence which would seem persuasively to establish the very fact to be ascertained.

MR. JUSTICE HOLMES and MR. JUSTICE STONE concurred with MR. JUSTICE BRANDEIS.

The case was argued by Messrs. Charles Markell and Charles McHenry Howard for the railway company and by Messrs. Thomas J. Tingley and Raymond S. Williams for the commission.

#### Taxation—Inheritance Taxes on Bonds of State—Where Taxable

Under the Fourteenth Amendment to the Constitution one state may not impose an inheritance tax upon the transfer of bonds and certificates of indebtedness issued by it or its municipal corporations, where such bonds and certificates are held and transferred in another state upon the death of their owner who, at the time of his death, was domiciled in such other state.

*Farmers' Loan & Trust v. Minnesota*, Adv. Op. 190; Sup. Ct. Rep., Vol. 50, p. 98.

This case came before the Court on appeal from a decision of the Supreme Court of Minnesota upholding an inheritance tax imposed by that State upon the transfer of certain negotiable bonds and certificates of indebtedness of the State, and of the cities of Minneapolis and St. Paul. Some of these were payable to bearer and some were registered. None had been used in connection with any business carried on in Minnesota, and all had been kept for a long time in New York, the owner's domicile, where a transfer tax was imposed upon them at the death of the owner.

The executor contended that the Minnesota tax conflicted with the Fourteenth Amendment, but the State courts ruled otherwise. On appeal the Supreme Court reversed this by a divided bench, the prevailing opinion being delivered by MR. JUSTICE McREYNOLDS.

Before discussing the conclusion reached by the majority he stated the contentions urged in support of the tax: that the obligations were debts of Minnesota

and her corporations, subject to her control; that her laws give them validity, protect them, and provide a means of enforcing them. It was conceded, moreover, that *Blackstone v. Miller*, 188 U. S. 189, and opinions approving it, support the validity of the exaction. But a recital of serious objections to the rule there laid down was presented to show that that case should be overruled. Referring to it MR. JUSTICE McREYNOLDS said:

The inevitable tendency of that view is to disturb good relations among the States and produce the kind of discontent expected to subside after establishment of the Union. The Federalist, No. VII. The practical effect of it has been bad; perhaps two-thirds of the States have endeavored to avoid the evil by resort to reciprocal exemption laws. It has been stoutly assailed on principle. Having reconsidered the supporting arguments in the light of our more recent opinions, we are compelled to declare it untenable. *Blackstone v. Miller* no longer can be regarded as a correct exposition of existing law; and to prevent misunderstanding it is definitely overruled.

Four different views concerning the situs for taxation of negotiable public obligations have been advanced. One fixes this at the domicile of the owner; another at the debtor's domicile; a third at the place where the instruments are found—physically present; and the fourth within the jurisdiction where the owner has caused them to become integral parts of a localized business. If each State can adopt any one of these and tax accordingly, obviously, the same bonds may be declared present for taxation in two, or three, or four places at the same moment. Such a startling possibility suggests a wrong premise.

*Blackstone v. Miller* was thought also to be out of harmony with the principles subsequently laid down in other cases holding that a state may not tax anything not within her jurisdiction, nor tax the testamentary transfer of property wholly beyond her power, nor lay death duties on the value of tangibles permanently located elsewhere, as part of the succession in estimating the tax imposed in the state of the decedent's domicile.

A discussion of considerations bearing on the taxation of intangibles then followed.

While debts have no actual territorial situs we have ruled that a State may properly apply the rule *mobilia sequuntur personam* and treat them as localized at the creditor's domicile for taxation purposes. Tangibles with permanent situs therein, and their testamentary transfer, may be taxed only by the State where they are found. And, we think, the general reasons declared sufficient to inhibit taxation of them by two States apply under present circumstances with no less force to intangibles with taxable situs imposed by due application of the legal fiction. Primitive conditions have passed; business is now transacted on a national scale. A very large part of the country's wealth is invested in negotiable securities whose protection against discrimination, unjust and oppressive taxation, is matter of the greatest moment. Twenty-four years ago *Union Refriger. Transit Co. v. Kentucky*, supra, declared: "In view of the enormous increase of such property (tangible personalty) since the construction of railways and the growth of manufactures, the tendency has been in recent years to treat it as having a situs of its own for the purpose of taxation and correlatively to exempt it at the domicile of the owner." And, certainly, existing conditions no less imperatively demand protection of choses in action against multiplied taxation whether following misapplication of some legal fiction or conflicting theories concerning the sovereign's right to exact contributions. For many years the trend of decisions here has been in that direction.

Taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences. We have determined that in general intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles. The difference between the two things, although obvious enough, seems insufficient to justify the harsh and oppressive discrimination against intangibles contended for on behalf of Minnesota.

The trend of decision in support of the result here reached was illustrated by reference to *State Tax on Foreign Held Bonds*, 15 Wall. 300, *Union Refrigeration Transit Co. v. Kentucky*, 199 U. S. 194, and *Safe Deposit & Trust Co. v. Virginia*, decided Nov. 25, 1929.

The bonds and certificates of the decedent had acquired permanent situs for taxation in New York; their testamentary transfer was properly taxable there but not in Minnesota.

MR. JUSTICE STONE concurred in the result, observing that although "the continued existence of the contract rested in part on the law of Minnesota, the relation of that law to the transfer in New York, both in point of theory and in every practical aspect, appears . . . too attenuated to constitute any reasonable basis for deeming the transfer to be within the taxing jurisdiction of Minnesota." He added, however, that it seemed unnecessary and undesirable broadly to condemn "double" taxation.

MR. JUSTICE HOLMES dissented, holding that *Blackstone v. Miller* should not be overruled. He argued that since the validity of the obligations depends on Minnesota law, that state has the power to impose a tax upon their transfer. He said in part:

It is not disputed that the transfer was taxable in New York, but there is no constitutional objection to the same transaction being taxed by two States, if the laws of both have to be invoked in order to give it effect. It may be assumed that the transfer considered by itself alone depends on the law of New York, but if the law of Minnesota is necessary to the existence of anything beyond a piece of paper to be transferred then Minnesota may demand payment for a privilege that could not exist without its help. It seems to me that the law of Minnesota is a present force necessary to the existence of the obligation, and that therefore, however contrary it may be to enlightened policy, the tax is good.

No one would doubt that the law of Minnesota was necessary to call the obligation into existence. Other states do not attempt to determine the legal consequences of acts done outside of their jurisdiction, and therefore whether certain acts done in Minnesota constitute a contract or not depends on the law of Minnesota alone. I think the same thing is true of the continuance of the obligation to the present time. It seems to me that it is the law of Minnesota alone that keeps the debt alive. Obviously at the beginning that law could have provided that the debt should be extinguished by the death of the creditor or by such other event as that law might point out. It gave the debt its duration. The continued operation of that law keeps the debt alive. Not to go too far into the field of speculation, but confining the discussion to cities of the State and the State itself, the continued existence of the cities and the readiness of the State to keep its promises depend upon the will of the State. If there were no constitution the State might abolish the debt by its fiat. The only effect of the constitution is that the law that originally gave the bonds continuance remains in force unchanged. But it is still the law of that State and no other. When such obligations are enforced by suit in another State it is on the footing of recognition, not of creation. *Deutsche Bank Filiale Nurnberg v. Humphrey*, 272 U. S. 517, 519. Another State, if it is civilized, does not undertake to say to the debtor now that we have caught you we will force an obligation upon you whether you still are bound by the law of your own State or not. I believe this to be the vital point. Unless I am wrong the debt, wherever enforced, is enforced only because it is recognized as such by the law that created it and keeps it still a debt. No doubt sometimes obligations are enforced elsewhere when the statute of limitations has run at home. But such decisions when defensible stand on the ground that the limitation is only procedural and does not extinguish the duty. If the statute extinguishes the debt by lapse of time no foreign jurisdiction that intelligently understood its function would attempt to make the debtor pay.

MR. JUSTICE BRANDEIS concurred with MR. JUSTICE HOLMES.

The case was argued by Mr. Cleon Headley for the appellant and by Mr. A. G. Youngquist for the appellee.

### Taxation—License Tax—Burden on Interstate Commerce

A tax of a certain percentage of the gross receipts of a taxpayer engaged in interstate and intrastate commerce and occupying streets and other public places in the conduct of its business based upon such proportion thereof as the property located in streets or public places bears to the whole of the taxpayer's property, is invalid as a burden on interstate commerce, where the taxpayer pays taxes at the local rates on all its real and personal property and the imposition on earnings is not a property tax, or in lieu of property taxes, but appears to be in fact a license fee for the privilege of engaging in interstate commerce.

*New Jersey Bell Telephone Co. v. Board of Taxes and Assessment*, Adv. Op. 143; Sup. Ct. Rep., Vol. 50, p. 111.

A New Jersey statute imposes a tax on all taxpayers using or occupying streets and other public places. In assessing the tax the assessors are directed to ascertain the amount of the property of such taxpayers located in streets or other public places and assess it at the local rates. The statute terms the tax a franchise tax and fixes it in amount at 5% of such proportion of the gross receipts as the length of the taxpayer's lines or mains in the streets or other public places bears to the whole lines or mains. It is further provided that this tax shall be in lieu of all other franchise taxes assessed against such taxpayers and their property.

The taxpayer here is a New Jersey corporation engaged in the telephone business, both interstate and intrastate. It pays property taxes on its plant in New Jersey, including large amounts of real and personal property; the average of local rates thereon was 3.877% in 1918. Its gross receipts for 1927 amounted to \$40,280,332.95. Of this it paid the amount based on intrastate earnings, but contested the portion based on interstate earnings. The state courts rejected the company's contention that the latter portion of the tax is an exaction repugnant to the Commerce Clause and upheld the tax as a tax on property, earnings being taken merely as a measure of the value of the company's franchise.

On appeal the Supreme Court reversed the ruling of the state court of last resort by a divided bench. MR. JUSTICE BUTLER delivered the opinion of the majority. In holding invalid the exaction as to gross earnings from interstate commerce he pointed out that the tax here is referred to in the statute as a franchise tax, and is declared to be in lieu of all other franchise taxes; that under the state constitution requiring property to be assessed according to uniform rules, the legislature cannot be deemed to intend direct valuation and assessment of some property at local rates and other elements of plant by a percentage of gross earnings. Attention was called also to the fact that amendments to the statute enacted after decisions holding the tax a license fee are indicative of a similar construction by the legislature.

In concluding, MR. JUSTICE BUTLER pointed out further objections to upholding this tax as a property tax, and said:

And the prescribed basis of apportionment of gross earnings is clearly inconsistent with the taxation according to its true value of appellant's right to use the street for its lines. The telephone property used to render the service from which the earnings are derived includes the lands, buildings, equipment, etc., as well as its lines; and material and labor for operation and maintenance are also required. The assumption underlying the prescribed rule is that, in respect of service and earnings per mile, mains

and lines in streets are the same as, or fairly comparable with, the other mains and lines. But it is well known that one stretch of line may consist of only a pair of wires while another stretch may carry many. The property in the streets was directly taxed by districts at \$41,189,804.00. Assuming, as appellee contends, that these assessments did not include the value of appellant's right to use streets, it would be without rational basis and arbitrary to use a mileage proportion of gross earnings to measure the value of the privilege or easement in question. And the amount of the franchise tax upon gross earnings was the equivalent of a tax at the average rate on property of value in excess of \$27,000,000. That would assign to the naked right to use streets for telephone mains and lines more than \$3,200 per mile. There has been called to our attention no precedent for the use of gross earnings as a measure of the value of a single element of such a plant. The elements of value resulting from appellant's power of eminent domain and possession of going concern and of a regulated monopoly cannot reasonably be deemed to be the sole or even a distinct source of the gross earnings by which the tax is measured. We think it very plain that the exaction is not a tax on property nor in substitution for or in lieu of a property tax. Within the rule heretofore applied in this Court the exaction is a direct tax on gross receipts derived from appellant's interstate commerce and, as to that part at least, is valid.

MR. JUSTICE HOLMES delivered a dissenting opinion in which he expressed the view that the exaction was a proper one which the state constitutionally may charge for a privilege. He said, in part:

What then is to hinder New Jersey from charging a reasonable price for something that the appellant cannot have without her consent? It is said that the hindrance lies in the fact that a part of the burden falls on interstate commerce. I am content to assume that if the State were attempting to discriminate against such commerce and using its right as a disguise, the attempt would fail. A right specifically protected by the Constitution may become a wrong when used to carry out an unlawful scheme. But there is nothing of that sort here. The tax is in lieu of all other taxes on intangible property, which the privilege is held to be in New Jersey. The reference to gross earnings to ascertain the value is legitimate. . . . The proportion is *prima facie* reasonable, especially in view of the proportions between the lengths of the lines and between state and inter-state business. It fairly may be supposed that the lines over the streets do their full share of the work. Furthermore the only objections to the tax raised in the record by the appellants are objections to the tax as a whole in so far as it may touch receipts from interstate business, not to the proportion adopted. And so I think that the incidence of a part of the tax on interstate commerce, if any such there be, "does not constitute a direct and material burden" upon it. . . .

I do not think names of any importance to this case, and do not discuss whether the tax is to be called a property tax upon an easement, a franchise tax upon an incorporeal hereditament as it is called in New Jersey, a license tax, or by some other title. If the statute fixes a price for what the appellant needs the State's permission to use, I think it within New Jersey's constitutional power. "Even interstate commerce must pay its way."

MR. JUSTICE BRANDEIS concurred with MR. JUSTICE HOLMES. MR. JUSTICE STONE took no part in the consideration or decision of the case.

The case was argued by Mr. Thomas G. Haight for the appellant and by Mr. Duane E. Minard for the appellees.

#### Clayton Act—Acquisition of Stock of Competitor—What Constitutes Lessening Competition

The Clayton Act was intended to prevent substantial lessening of competition injurious to the public, and where two companies are engaged in a similar business, but their products differ so that one deals chiefly in rural sections and the other in cities, and where their markets are located in different sections of the country, there is no substantial competition between them and control of one by purchase of the capital stock of another is not a violation of the Act.

Moreover, where the company whose control is acquired

is in such financial difficulties that there is no reasonable prospect that it can continue in business, and the purchasing company is in need of increased facilities and secures control with no purpose of lessening competition, the acquisition of control is not prejudicial to the public in contemplation of law, and does not substantially lessen competition within the meaning of the Act.

*International Shoe Company v. Federal Trade Commission*, Adv. Op. 173; Sup. Ct. Rep., Vol. 50, p. 89.

The Court here reviewed a proceeding instituted by the Federal Trade Commission charging the petitioner with a violation of §7 of the Clayton Act. That section provides:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce. . . .

"This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition."

The violation charged was that the petitioner had purchased substantially all of the stock of the McElwain Company, a manufacturer of shoes, the effect of which was to substantially lessen competition between the two companies and to restrain commerce in the shoe business in places where the two companies were engaged in interstate commerce.

The Commission, after hearing, made findings in support of the charges and entered an order directing petitioner to divest itself of the stock and to cease and desist from control of the McElwain Company. This order the circuit court of appeals upheld, but on certiorari the decision was reversed by a divided Court, MR. JUSTICE SUTHERLAND delivering the majority opinion.

He stated that on a careful review of the evidence the Court found (1) that there never had been substantial competition between the two shoe companies, and therefore that there was no basis for a charge of substantially lessening competition, and (2) that the McElwain Company was in such financial difficulties as to require liquidation or sale so that the prospect of future competition did not exist.

In reaching these conclusions a review of the evidence was thought to show that the two companies so far as they competed at all, manufactured products of a different type, one company's product being a better looking article appealing to city trade, and the other being more durable and appealing to trade in rural sections and small communities.

Moreover, analysis of the evidence was thought to show that the bulk of trade of the two companies was in markets in different sections of the country.

In view of these conditions the Court thought that the Commission's findings and order could not be upheld.

Section 7 of the Clayton Act, as its terms and the nature of the remedy prescribed plainly suggest, was intended for the protection of the public against the evils which were supposed to flow from the undue lessening of competition. In *Standard Oil Co. v. Federal Trade Commission*, 282 Fed. 81, 87, the Court of Appeals for the Third Circuit applied the test to the Clayton Act which had heretofore been held applicable to the Sherman Act, namely, that the standard of legality was the absence or presence of prejudice to the public interest by unduly re-

stricting competition or unduly obstructing the due course of trade. In *Fed. Trade Comm. v. Sinclair Co.*, 261 U. S. 463, 476, referring to the Clayton Act and the Federal Trade Commission Act, this Court said:

"The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain."

Mere acquisition by one corporation of the stock of a competitor, even though it results in some lessening of competition, is not forbidden; the act deals only with such acquisitions as probably will result in lessening competition to a substantial degree. . . . that is to say, to such a degree as will injuriously affect the public. Obviously, such acquisition will not produce the forbidden result if there be no preexisting substantial competition to be affected; for the public interest is not concerned in the lessening of competition, which, to begin with, is itself without real substance. To hold that the 95 percent of the McElwain product, sold in the large centers of population to meet a distinct demand for that particular product, was sold in competition with the 95 percent of the International product, sold in the rural sections and the small towns to meet a wholly different demand, is to apply the word "competition" in a highly deceptive sense. And if it be conceded that the entire remaining five per cent of each company's product (although clearly it was materially less than that) was sold in competitive markets, it is hard to see in this, competition of such substance as to fall within the serious purposes of the Clayton Act.

Evidence relating to the other aspect of the case, namely, the financial difficulties of the McElwain Company, was found to show that in purpose and result there was no substantial lessening of competition, in contemplation of the Clayton Act. In this respect it appeared that the McElwain Company had suffered grave business reverses and was unable to meet its obligations as they came due. The International Company, on the other hand, was prosperous and in need of additional factories to enable it to fill orders which greatly exceeded its capacity. The McElwain Company was thus faced with the necessity of borrowing further funds and assuming even graver risks, or it might have gone into a receivership. There was also the possibility of bankruptcy, voluntary or involuntary. Under such conditions the Court thought there was no illegality in the transfer of control to the petitioner.

As between these and all other alternatives, and the alternative of a sale such as was made, the officers, stockholders and creditors, thoroughly familiar with the factors of a critical situation and more able than commission or court to foresee future contingencies, after much consideration, felt compelled to choose the latter alternative. There is no reason to doubt that in so doing they exercised a judgment which was both honest and well informed; and if aid be needed to fortify their conclusion, it may be found in the familiar presumption of rightfulness which attaches to human conduct in general. *Bank of the U. S. v. Dandridge*, 12 Wheat. 64, 69. Aside from these considerations, the soundness of the conclusion which they reached finds ample confirmation in the facts already discussed and others disclosed by the record.

In the light of the case disclosed of a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure with resulting loss to its stockholders and injury to the communities where its plants were operated, we hold that the purchase of its capital stock by a competitor (there being no other prospective purchasers), not with a purpose to lessen competition, but to facilitate the accumulated business of the purchaser and with the effect of mitigating seriously injurious consequences otherwise probable, is not in contemplation of law prejudicial to the public and does not substantially lessen competition or restrain commerce within the intent of the Clayton Act. To regard such a transaction as a violation of law, as this Court suggested in *United States v. U. S. Steel Corp.*, 251 U. S. 417, 446-447, would "seem a distempered view of purchase and result."

MR. JUSTICE STONE dissented, holding that the findings of the Commission as to the existence of com-

petition supported by evidence, and therefore conclusive on the Courts by the terms of the Federal Trade Commission Act.

He also thought that there was nothing to preclude the Commission's inference that conduct of the business through a receivership or through a reorganized company would probably continue competition between the companies.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS concurred in the dissenting opinion.

The case was argued by Mr. Charles Nagel for the petitioner and by Mr. John Lord O'Brian for the respondent.

#### Constitutional Law—Seizure of Property of Absconding Husband—Failure to Give Notice

The New York statute permitting seizure of property of an absconding person abandoning his wife or child likely to become a charge on the public, without actual or constructive notice to such absconder, does not embody a denial of due process of law, where such person may secure restoration of his property on return to the support of his wife or child, or may nullify the whole proceeding by proof that there is lack of the jurisdictional relation forming the basis of the proceeding.

*Corn Exchange Bank v. Coler*, Adv. Op. 211; Sup. Ct. Rep. Vol. 50, p. 94.

In this opinion, delivered by MR. JUSTICE McREYNOLDS, the Court considered and held valid certain legislation of the State of New York relating to the seizure of property of a father or husband who abandons his child or wife, leaving them likely to become public charges.

The procedure prescribed (and followed here), originates on application of the Commissioner of Public Welfare to two magistrates for a warrant to seize the property of an absconding husband or father leaving wife or child likely to become public charges. On proof of the facts set forth in the application a warrant may be issued, and thereupon the officer receiving it may seize the property wherever found in his county and is vested with all the title which the absconding person had; on a return of the proceedings to the next term of the County Court, the Court may inquire into the circumstances and may confirm or discharge the warrant and seizure. If the proceedings are confirmed the court may order the property sold from time to time and direct how the proceeds shall be applied to maintain the abandoned wife or children. But if the husband returns and supports his wife and children the warrant is discharged and the property is restored.

The proceeding was shown to be an ancient one, antedating the Revolution, and is similar to a statutory proceeding in England adopted in 1718. It was extended to chases in action in New York in 1829.

The defendant here was a bank in which an alleged absconding person had funds on deposit. It resisted the proceeding upon the ground that it violated the due process clause by failure to provide for actual or constructive notice to the absconder. The New York Court of Appeals rejected the contention, pointing out, however, that the victim may nullify the whole proceeding by proof that the jurisdictional relation forming the basis of the proceeding is lacking.

On appeal by the bank the Supreme Court found no denial of due process and affirmed the judgment. MR. JUSTICE McREYNOLDS said:

In *Owney v. Morgan*, 256 U. S. 94, 112, we upheld certain rather harsh legislation of the State of Delaware modeled on the custom of London and dating back to

Colonial days. Its validity, challenged because of alleged conflict with the due process clause of the Fourteenth Amendment, was sustained because of the origin and antiquity of the provision.

"However desirable it is that the old forms of procedure be improved with the progress of time, it cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy. Its function is negative, not affirmative, and it carries no mandate for particular measures of reform. For instance, it does not constrain the States to accept particular modern doctrines of equity, or adopt a combined system of law and equity procedure, or dispense with all necessity for form and method in pleading, or give untrammelled liberty to make amendments. Neither does it, as we think, require a State to relieve the hardship of an ancient and familiar method of procedure by dispensing with the exaction of special security from an appearing defendant in foreign attachment."

Following the reasoning of that cause we think the statute here under consideration cannot be said to offend the Federal Constitution.

That the appellant Bank under some remote possibility may be called upon to pay a second time is true; but when voluntarily contracting with the depositor it knew this and accepted the consequent responsibility. Under the approved practice there was abundant opportunity to make defense—to require proof of all essential facts. At all events, its position is not materially worse than that of a debtor who must pay one who holds letters testamentary issued upon proof of death, though in truth the creditor may be alive with power to repudiate the appointment.

The case was argued by Mr. Spottswood D. Bow-ers for the appellant and by Mr. J. Joseph Lilly for the appellee.

#### Contracts—Liquidated Damages—Penalty Unenforceable Against Bankrupt's Estate

A covenant in a lease that the filing of any petition in bankruptcy by or against the lessee shall constitute a breach of the lease, and shall ipso facto terminate the same, and shall entitle the lessor to recover damages equal to the rent for the residue of the term, is a provision for an unenforceable penalty.

*Kothe v. Taylor Trust*, Adv. Op. 196; Sup. Ct. Rep.

The lessor here sought to enforce against the trustee in bankruptcy of a bankrupt lessee a claim for breach of covenant in the lease. The covenant was to the effect that the filing of a petition in bankruptcy by or against the lessee should constitute a breach of the lease causing it to terminate ipso facto, without entry or other action by the lessor. It further provided that the lessor should forthwith be entitled to damages therefor in an amount equal to the rent for the residue of the term.

The term was apparently two years at a rental of \$4,000 per annum. When the lessee was adjudged bankrupt the lessor filed proof of debt for \$5,000 as rent for the unexpired portion of the term, being from February 15, 1928, to May 15, 1929. The referee and the district court refused to allow the claim because it was not for rent accruing before the filing of the petition in bankruptcy. The circuit court of appeals held that the claim should have been allowed, but on certiorari this was reversed by the Supreme Court in an opinion delivered by Mr. JUSTICE McREYNOLDS. He first conceded that ordinarily the courts would enforce a provision for liquidated damages, even in the absence of proof of damages actually sustained. But a distinction was taken between such a case and the present one where there was no reasonable relation between the sum fixed and any probable damage resulting from breach.

Here, we find the lessee in a lease for two years agreeing that the mere filing of a petition in bankruptcy against him shall be deemed a breach and thereupon, ipso

facto, it shall be terminated and the lessor shall become entitled to re-enter also to recover damages equal to the full amount of the rent reserved for the remainder of the term. The amount thus stipulated is so disproportionate to any damage reasonably to be anticipated in the circumstances disclosed that we must hold the provision is for an unenforceable penalty. The parties were consciously undertaking to contract for payment to be made out of the assets of a bankrupt estate—not for something which the lessee personally would be required to discharge. He, therefore, had little, if any, immediate concern with the amount of the claim to be presented; most probably, that would affect only those entitled to share in the proceeds of property beyond his control.

The broad purpose of the Bankruptcy Act is to bring about an equitable distribution of the bankrupt's estate among creditors holding just demands based upon adequate consideration. Any agreement which tends to defeat that beneficent design must be regarded with disfavor. Considering the time which the lease here involved had to run, nothing else appearing, it seems plain enough that the real design of the challenged provision was to insure to the lessor preferential treatment in the event of bankruptcy. The record discloses no circumstance sufficient to support a contrary view. If the term were much shorter, or there were facts tending to disclose a proper purpose, the argument in favor of the lessor would be more persuasive.

The case was argued by Mr. Frank H. Pardee for the petitioner and by Mr. George F. Taft for the respondent.

#### Criminal Statutes in 1929

(Continued from page 169)

than that for which the defendant was held to answer.

New York, Chapter 176, simplifies indictment and specifies that it need only describe the crime by its name, as arson, or if it has no name, then by a brief description of it as given by the statute. The proof may show that the defendant committed any of the acts or omissions forbidden by the statute defining the crime charged. To protect the defendant, however, from uncertainty, the district attorney must, at his request, file a bill of particulars giving reasonable information as to the nature and character of the crime charged. The act also authorizes amendment of the indictment or of the bill of particulars. An interesting change of the running of the statute of limitations is contained in New York, Chapter 246, which makes the commencement of prosecution the effective date for the closing of the running of the statute, not the date of the indictment found, as formerly. Consequently the prosecution must be commenced within the period permitted; the finding of an indictment no longer stops the running of the statute.

Ohio, page 134, revises generally its Code of Criminal Procedure. An important change permits the failure of a person to testify to be considered by court and jury and "to be made the subject of comment by counsel." The statute incorporates the rule that perjury must be proved by the evidence of two witnesses, or of one witness and corroborating circumstances. The section requiring the court to hear testimony after verdict in mitigation of sentence is strengthened in the modern manner by authorizing the judge to have investigation made by the probation officer and to have two psychologists or psychiatrists examine and report on the defendant. The defendant may examine the persons who make such reports.

# LAW SCHOOLS TODAY AND TOMORROW

Extent to Which Advancements Made in Legal Education Have or Have Not Been Made  
Part of Legal Educational System of the Country—Law Office Training—Cram  
Schools—Commercialized Law Schools—Training for Business—Combined  
Course—Ethics for Law Schools—Period of Law Study—The Part  
Time Dean—The Case Method—Movie Help for Practice  
Court Work, Etc.\*

BY H. C. HORACK

*President of Association of American Law Schools, 1929*

LAW schools in America have all but completely supplanted the older methods of legal education. No longer are students scattered in law offices throughout the country: they are now congregated in schools of varying types. This fact is of immense significance, since the coming together of students in law schools makes possible an effective control of the quality and training of the material from which the legal profession is recruited. Attention, therefore, should be directed, not to any group or organization, but to the one object of this Association, "The improvement of legal education in America, especially in the law schools."

It might be charged that one of the marked peculiarities of those engaged in law school teaching is that they know so little of the work being done in institutions other than their own. It is as provincial for a few of the older or larger schools to know only something of each other as it is for the younger or smaller schools to know only of the activities of their immediate neighbors. In general the feeling of each group is that it is much better than the world realizes and that its neighbors are not as good as they think they are.

No national school, however large or excellent, can hope to have more than a limited and indirect influence upon the growth of the law and the character of the bar of a particular state. It is only by the development and maintenance of strong local institutions educating large portions of the local bar that the profession and, through it, the law of each state can be effectively improved.

Plans developed or practices employed at one institution find lodgment in others only to a very limited extent. This is due in many cases to influences which tend to neutralize any ideas or inspirations secured at professional gatherings of law teachers, when an attempt is made to apply them in the local field. Usually only a small proportion of the full-time faculty attends and those who habitually remain at home close their minds to new ideas, while the part-time teachers, local judges or practitioners, often men of superior ability and strong personality, have but little time for serious thought concerning new suggestions, developed at meetings in which they have not participated. There is but little introspective attitude as to the

observance of established rules of conduct and methods of teaching.

The value to legal education of the experiments now being carried on in several schools cannot be overestimated and the legal education of a not far distant day may be very materially affected by these and other studies still to be made. Yet as these experiments attract our attention, our thoughts should not be diverted from the problem of the extent to which advancements already clearly recognized have or have not been made a part of the legal educational system of the country.

It is perhaps worthwhile, therefore, temporarily to remove our gaze from the superlative or spectacular in legal education and view it as it exists in the bulk of the schools in America which are doing the work of preparing men for the profession of the law.

## Law Office Training

The last decade has marked the almost total disappearance of law office training as preparation for admission to the bar. No one familiar with the opportunities for student study in the modern law office can view this with regret, for there is in general not even a family resemblance between the law office training of recent years and that of a generation or two ago.

When, in times gone by, the young practitioners received their training in the law offices, good, bad, and indifferent, there was one effect of the old system which was of especial value; there was established a professional tradition of personal interest by the members of the bar in the development of the young lawyer. Every lawyer was to a certain extent a law teacher. This involved a personal sacrifice of time and often of actual money outlay which gave emphasis to professional responsibilities and ideals.

In recent years the number of young men seeking admission to the bar on the basis of even so-called office training has been rapidly diminishing and of these there is seldom a case of the type of training with the personal responsibility and supervision such as was given by the lawyers of the old school. One bar examiner goes so far as to say that ninety per cent of the affidavits given as to office study are false or show such lack of professional responsibility that the lawyers giving them should be disbarred.

The young man employed in the modern high class office has no time to "read law" as the term

\*Address delivered at annual meeting of Association of American Law Schools at New Orleans, La., Dec., 1929.

was used in a past generation. He is an employee, and though it may be possible for him to learn something of his employer's business, this is his affair and not that of his employer. It is not surprising, however, that many lawyers with remembrances of an earlier day and deceived by a familiar label should champion the old plan which they fondly believe still to exist. "Reading law" and "law office study" are now but names on the statute books. As a method of preparation for practice it has definitely passed and with it has gone the lawyer's intense interest in legal education and the fine tradition of professional responsibility for those who seek admission to the bar.

### Cram Schools

To supplement this modern law office employment there sprang up the present evening or part-time school. If the original purpose was to supplement the knowledge of practice and procedure of the law office with systematic instruction in law, this good purpose was soon forgotten by many schools as vast numbers of young men in unrelated lines of day time activities sought through an evening course of study to get admission to the bar. It is not surprising that some schools, particularly those operated for pecuniary profit, soon should have lost sight of any real educational purpose, and have aimed only to prepare students to pass the bar examinations, with the minimum of effort and expense on the part of the school to accomplish that result.

The bar examinations offered in many states have unwittingly played into the hands of such law schools. The old style of examination inherited from the lenient office study days in many places still continues with the result that a shrewd person making a careful analysis of the questions asked over a period of a few years can make it possible for students of poorest quality to recognize a sufficient number of the definitions and questions repeated from year to year and to give enough of the expected answers, to make possible admission to practice.

These factory-type law schools, sometimes called "sausage mills," are immensely profitable. Many young lawyers, in order to add to their incomes, gladly give their services for small compensation. Often judges and lawyers of considerable standing are not averse to earning a little vacation money in this way and feel that there is some prestige to be gained by being considered scholarly in holding an academic position.

Without idea or purpose of doing more than cram their students for the bar examinations, these schools have made very difficult, if not almost impossible, the development of a better type of part-time school. It is hard to convince a student contemplating evening law study that he should attend a better school that will require more careful preparation and a higher grade of accomplishment, when he sees in sight the same degree and license to practice to be attained by less work and by a shorter course.

Ability to pass the bar examination is emphasized and advertised as if it were the true test of a law school's excellence and the one aim of legal education. Bar examinations of such a character

are often given that it is possible for the cram course students to pass them more readily than those who have spent their time in receiving real legal training. In this situation evening school competition quickly results in the bad schools driving out the good schools.

The present problem of improving the quality of the bar lies not in condemning or seeking to destroy all night schools because many are bad, but in striving to make possible conditions which will encourage the highest development of those that are trying to educate rather than to cram. Then only can judgment fairly be passed upon the problem of evening school education.

The cram school is the worst influence on the profession today, and it is the lenient and irresponsible bar examiner that is making it both possible and profitable. This matter of archaic and ineffective bar examinations is one of the most striking and far-reaching deficiencies of our present professional structure. The law teacher can influence it only indirectly, but it demands the immediate and most thoughtful attention of the whole American bar.

### Commercialized Law Schools

As yet no serious effort has been made to determine what constitutes conducting a school for pecuniary profit. Certainly this phrase goes beyond the crude scheme of a mere proprietary school where the owner directly pockets all the net proceeds.

From the standpoint of the good of legal education, is a school essentially any less commercialized when it is denied needed library and equipment, or funds with which to employ instructors who are capable of high quality of work, in order that the law school may produce an actual profit to be applied to the support of other university activities?

Perhaps the question of commercialization might be debatable if all the funds necessary to the full development of the highest type of law school were first so applied leaving a surplus for other purposes, but until this stage has been reached there would seem but little reason for refusing to consider a school as one operated for pecuniary profit, even though such profit may not go, even indirectly, to private persons.

### Training for Business

Many law schools are emphasizing law training for business. Schools with enormous attendance seem to feel called upon to apologize for their vast numbers by explaining that a large portion of their graduates do not plan to practice law, but expect to use their legal training as an aid in business. Every person should be as much interested in health as in business, yet one can hardly imagine a medical school filling its classes with those who do not intend to become physicians but merely seek some knowledge of medicine as an aid to the maintenance of good health.

It is unnecessary for young men who do not look forward to practice to take a full law course, and the time thus spent might be much better employed by attending a good school of commerce or business administration. There the student may be given such courses dealing with law as are neces-

sary to a proper knowledge of business relations, without giving him a standing in the profession with an LL.B. degree, and an opportunity to secure a license to practice. There is no justification for encouraging the practice of law as a business side line or the lending of professional position to some financial institution that it may thus avoid prosecution for practicing law without a license.

Why should law schools give training for business any more than schools of commerce and business should give training for the law? The schools that are confusing the ideas of business and professional training are in no inconsiderable measure responsible for the charge that the practice of law is rapidly changing from a profession to a business. It is time that each law school decide whether it is a business or a professional school.

#### Combined Course

Of almost equal harm to the maintenance of standards in many schools is the encouragement given to students not expecting to pursue a professional career to take the first year of law work as a part of a liberal education. These students do not bring the spirit nor the interest that should mark attendance at a professional school, but tend to perpetuate the attitude of the liberal arts college with its many extra-curricular interests which are a part of collegiate activities.

Though the combined course may be desirable as shortening the period of study for those who intend to pursue the law as a profession, it cannot be justified when it results in turning the first and most important year of law study into a mere adjunct of a liberal arts education, thus setting an improper standard of professional work which the other students who continue their law study will carry all through their law school career.

It is lack of courage rather than lack of desire to maintain the professional school spirit that induces the faculty to permit these students who do not desire to become lawyers to affect the standard of the work of the whole first year class. It is hard to refuse credit toward an A.B. degree when the announcements of the Liberal Arts Commencement have been issued with the student's name included, and his friends and relatives invited. Schools that have held to a high standard of professional education, and have had the courage to apply it, soon find that few liberal arts seniors take the first year of law as a climax to a purely cultural course. The application of courage seems to be required but once!

#### Ethics for Law Schools

One of the most necessary steps to be taken for the improvement of legal education and the quality of those who seek entrance to the profession, is the application to law schools of some of the simple standards of professional ethics which have been established for the members of the bar. Every reason that applies to improper advertising by individuals applies with equal or greater force to the law schools which extol in advertisements their virtues and their efficiency. The lawyer who advertises may be better than his fellows and merely wants to apprise the public of that fact so that they may benefit by this knowledge. The profession, however, has not taken this view, but has sought

to protect the public from the unethical advertising of the attorney who blatantly proclaims his assumed virtues and ability, and emphasizes the successes he claims to have scored in court. Unrestrained, such an attorney will secure clients without number and find a quick road to wealth.

Though the attitude toward the attorney who advertises is well defined, the profession seems to view complacently the law school that follows similar tactics to get business, and that profits accordingly.

In their advertisements are to be found announcements in black-face type of a full course in legal ethics. There are glowing accounts of the generous incomes that await the law trained man, reminders that the heads of large corporations with yearly incomes in six figures secured their positions through the law, statements of the ease with which a legal education can be acquired, and the success which their graduates have in passing the bar examinations and in securing a lucrative practice. Such advertising has no doubt induced many thousands of young men to study law who are not needed in the profession and who have neither the character nor fitness for it. In the struggle to secure students some law schools have even indulged in what may be described as law school ambulance chasing, paying runners a certain sum per head for each student brought in and enrolled.

The effect of unethical law schools upon the ethics of the profession which they are helping to create may be much more harmful in its effect than the improper conduct of any considerable number of individual attorneys.

There is great need that bar association committees should give the gravest attention to the activities of law schools and apply to all those connected with them the same standard of professional conduct required of an attorney in his practice. Every member of the profession associated with a law school should be held personally accountable for its activities if, after reasonable opportunity to know of them, he retains his connection with the school and thus lends his name and his aid to the furtherance of its improper practices.

#### Period of Law Study

The generally accepted standard of the length of the period of law study is three years of full-time work. The equivalent, or rather, the generally accepted substitute, is four years of part-time work. Both standards contemplate that a minimum time of law study should be required. It is apparent that one student may secure infinitely more in three years than may be acquired by another. Many students, if allowed to do so, could cover the work of the course as it is done by some or even a majority of the students in much less than the required time, securing marks above the minimum and gaining enough information to pass the state bar examinations. Though none of the better schools today permit such shortening of the three-year period of study, the practice was quite common a comparatively short time ago, and this Association saw fit to pass a resolution to make clear to its members that "any school which gives a degree to a student who has studied law for less than

three years is not complying" with the article requiring three years of full-time study.

That the part-time school should not permit its better students to shorten their period of study has been taken for granted by those connected with full-time law schools. It has been thought that the four-year period for such study was none too much even for the better student, though he might be able to do in three years what those less fortunate or less ambitious barely accomplished in four years.

Any time limit as applied to a particular individual is arbitrary yet this is the present measure for determining what constitutes full-time or part-time law study. By this test it is improper to allow a full-time student to finish in less than three years or a part-time student in less than four years. Nor is the situation changed by the fact that the student is registered for one type of course rather than the other.

If it is improper for a brilliant policeman attending a night school to shorten his part-time course to three years, it would seem to be just as improper to permit an equally brilliant night watchman to attend a day-time school and receive his degree in three years and be considered to have completed three full years of study.

Because a school is offering a full-time course it is not justified in making a conclusive presumption that all the students registered for such a course are giving full time to their study. Every dean would no doubt much prefer to spend his time in considering the various approaches to or retreats from the law, yet if he has assumed the conduct of a full-time school his duty goes beyond the mere offering of a full-time course for those who desire to put in full time in taking it, and it is necessary not only to provide that the "curriculum and schedule of work are so arranged that . . . substantially the full working time of its students is required for the work of the school," but also to see that the students are actually giving substantially their full working time to their law study.

If the student in the evening school is required to study law for four years, the student in the day school, working under essentially similar conditions as to hours devoted to activities other than the study of law, should have his schedule of classes reduced in proportion, for the test of full-time as distinguished from part-time study is certainly not the number of hours of class-room work per week for which the student is willing to register or which he may be able to carry and pass on examination.

Whatever virtue there may be in the many extra-curricular activities in which students participate during the college course, they have no sufficient value as a part of professional training to justify permitting students extensively engaged in such activities to carry full law school work, and schedules of class hours should be reduced as in the case of those who are spending their energies in making a living while studying law.

It is surprising to find law schools actually advertising the outside activities of their law students, proudly announcing that its membership provides the debating team, the editor of the college paper, the manager of the college annual and

the participants in many other outside activities which have nothing to do with legal education and which should have been left behind when the preparation for the study of law was completed.

It may be unnecessary and improper to become fully informed as to the exact manner in which a student spends his entire time, but it would seem both necessary and proper to be sufficiently informed to be able to classify him in relation to his law school study, as full-time, part-time, or no-time. The test need not be whether the student is engaged in any outside activities but whether such activities are materially interfering with the student's ability to devote substantially his "full working time" to the study of law.

### The Part-Time Dean

Though most of the better law schools of America fulfill the requirement as to the number of full-time law teachers, several have part-time deans, some chosen as a result of pressure by the local bar who wish to have a practitioner in charge of the law school whom the bar knows and in whom they have confidence. It is natural that the practicing lawyer, knowing nothing of the duties and responsibilities of the administration of a law school or of modern conditions of law study should think that a bit of sound judgment exercised now and then would be sufficient to do the job. The result is that the part-time dean usually does not administer, and not infrequently effectually prevents anyone else from so doing.

Such a dean in a full-time school commonly has the eight o'clock morning hour. At nine o'clock he puts on his hat and hurries to his office and the law school sees him no more, unless a monthly or semi-annual or annual faculty meeting, if such are held, may call him again to the building for a special appointment.

Is it surprising that the full-time members of the faculty, emulating their dean, as soon as a lecture is over, should pick up their hats and, as they say, "go home to study?" It is even less surprising that the students should emulate the faculty and leave the building, their attention and activities centered elsewhere until the next lecture hour, or later, while the foundations of the building groan under the burden of dust which has settled on the seventy-five hundred volumes in the library.

The excuse often given for the part-time dean is that the institution is thus securing the ability of a fifteen or twenty or thirty thousand dollar man, yet to one who comes from the outside to view the organization and activities of the school this is not usually apparent. As a matter of fact, the part-time deans, with only an occasional exception, are merely part-time teachers, the amount of time devoted to real matters of law school administration being almost negligible, for this cannot be done at a set hour of the day, nor much less can it be accomplished incidentally and at odd moments.

It is much to be regretted that certain of the very able men now so employed are not secured to give their entire interest and energy to the up-building of the law schools with which they are connected. From the standpoint of legal education it matters little what ability these men may possess

unless the law school is securing the advantage of it.

### The Case-Method

While some schools are considering what should be the next step in advance of the case method, a large proportion of the law schools have not yet discovered what it was devised to accomplish nor how it should be used. In many schools it is employed merely as a series of illustrative cases, in others as the basis of a lecture course, and in others each case is used as standing for a principle which the student is induced almost to commit to memory, the sum total of all the principles thus committed being considered to represent a full knowledge of the subject. The misuse of the case system is due in part to the use of poorly constructed case books hastily built at the behest of some publishing house and adopted through the persuasion of an agreeable traveling salesman. It is due also to the fact that it is so much easier for the instructor to tell the student all about the case than to get the student to tell it, so much easier to ask questions of the student than to get the student to ask questions.

The success of the case method is not dependent upon full-time as distinguished from part-time study, as is shown by the fact that many part-time students, both in full-time and part-time schools, are deriving from it the same benefits that come to full-time students when it is properly presented. However, more than with any other of the generally recognized methods of instruction, law school equipment and the capacity and experience of the instructor and his vision of its purpose, determine the results secured.

Many schools have adopted the case method of study without providing proper class room furniture for its use. Without adequate benches on which to rest a book and take notes, both students and instructor soon lose interest and become discouraged and dissatisfied. Even though the use of the case book may be continued, the class soon reverts to a system which requires less intellectual activity during the class period, but better fits the furniture provided.

It would be rash indeed to consider the case system as being the final development in law teaching methods. As effective as it may be in the student's first year of study, it does not follow that it is necessarily equally desirable in his last year. The third year restlessness with unvaried study of cases which has often been observed, may suggest that the student in his more advanced work is ready for a somewhat different approach to the study of law.

As the law course has been lengthened from one year to two years, and now to three years, it is not improbable that the future may see the course extended in many law schools to four years with the work perhaps divided into junior and senior courses, the junior course being devoted to an intensive study of cases with an emphasis upon the careful use of the case method, while the senior course, differing in content and method of approach, may connect the student more directly with the actual application of the law and at the same time introduce him to a broader viewpoint and create in

him a more active interest in the administration of justice.

Whatever may be the future of the case method of study or the extent of its use, its present presentation deserves more thoughtful and understanding treatment than it is now receiving in order that students may secure from it the benefits it was designed to accomplish.

### Practice Court Work

A few years ago practitioners were demanding that law schools become more practical and instruct their students so that they might step from the class room to the court room. In response to this demand most schools have fitted up more or less elaborate practice court rooms. Though the student has thus become acquainted with the various pieces of furniture of the court room, his experience in actual trial court work has not been materially enlarged.

Whether the work is in charge of a full-time law teacher, an active practitioner, or a local judge, the results are much the same. Proper materials for trial court work are lacking, and, except for the occasional school that stages an annual murder for a spectacular trial of a type in which it is to be hoped the student will not in practice be called upon to participate, the so-called trials, based upon written statements of facts, do not make possible any near approach to reality.

If these exercises were but limited to frivolousness and horseplay their effect on the student would be bad enough, but in many cases they are much worse than unless in that they introduce the students to some of the worst forms of unethical practice. Often prospective attorneys are given the statement of facts and are assigned or allowed to pick those who are to testify. Nor is the situation very materially improved when the instructor gives directly to each witness an outline of the matters which are to be the foundation of his testimony. In either case it is quite impossible to present a complete picture of the matters in controversy or to describe in detail the events which are to be related on the witness stand. After the issuance of these statements there follows such coaching of witnesses as to the testimony they are to present as in actual practice would very properly be considered grounds for disbarment.

It is possible that the co-operation of the motion picture industry may make available materials which will avoid the difficulties which have made so much of the practice court work not a mere farce, but a tragedy.

Short scenes may be shown which present the facts on which an action is to be based. Such scenes may be taken from different angles, and shown at different times to the various persons who may be called upon to testify. These scenes need not be marked as the ones about which testimony is to be given but may be presented with cuts from other pictures at the same showing so that the witnesses are not warned to give special attention to particular matters concerning which they may expect to testify. The attorneys should not see the pictures which set forth the matters on which the trial is to be based, and the case need not be tried until some weeks or months after the showing of the pic-

tures, so that there will be that variation which results both from inaccurate observation and defective memory.

With the judge exercising a firm hand as to the scope of cross-examination, there appears to be made possible through motion pictures practice court trials which may approach in essential particulars the actual conduct of cases in court; trials which will not lend themselves to the training in unethical practices with which much of the present practice court trial work is to be charged.

More time need not be devoted to these matters than is now given to them, but it is hoped that the time expended may be more beneficially and effectively applied.

### Preparation for Teaching

The quality of instruction quite generally found in law schools leaves much to be desired. Classes are often conducted by a quiz method such as might be used in the primary grades of a rural school where the only object is to determine whether or not a pupil has read a given assignment. Unfortunately there is no set form which, pointed out and rigidly followed, will produce an efficient instructor. Though it is universally agreed that the law teacher should be a person of high mentality, it is possible that this requisite sometimes has been overlooked by those having in charge the selection of teachers.

Universities whose liberal arts departments require an advanced degree from every applicant for a teaching position, freely take into their law faculties men whose only preparation was that necessary to pass the bar examinations. With the development of graduate study in a number of law schools, it is hoped that university administrators may soon feel that they should demand of law teachers preparation comparable to that required of instructors in various collegiate departments.

In the conduct of graduate courses in law, little, if any, attention has been given to study of the problems of legal education, although these courses are filled almost entirely with men who are planning to enter or return to law teaching. Here they may get instruction and opportunity to study in almost every field but that in which they are most directly concerned.

The one fundamental preparation for law teaching is a careful and thorough training in the study of law, and no instruction in how to instruct can ever make a law teacher.

Save us from a school of legal pedagogy, but give to these graduate students some small opportunity to become acquainted with the problems of their branch of the profession.

### Quantitative and Qualitative Standards

The attempt to improve law schools by setting up certain standards or requirements has so far resulted in establishing essentially nothing more than a quantitative minimum. Such rules are adopted with the hope that they may be self-operating or at most require only a more or less mechanical checking to determine compliance. A very useful purpose is served in setting for schools that are below this minimum a definite objective to be attained. But once reached this should be

but the beginning of progress and development. The standards are not high. An officer of one of the great church organizations having heard complaint concerning certain Articles of this Association, after studying them carefully, said: "These are not standards of excellence, but only minimum standards of decency."

Yet it is doubtful if any very substantial improvement will result from setting out other or more detailed quantitative specifications for law schools. It is related that a factory owner desiring to establish better living conditions for his employees, required that every cottage rented to a worker should contain a bath tub. Later an investigation revealed that in ninety per cent of the homes this equipment was being used for the storage of kitchen coal. It seems probable that a requirement doubling the number of bath tubs would not have produced a marked improvement in the habits of the community. It is of little avail to increase to fifteen thousand the number of volumes required for the library if the seventy-five hundred now on the shelves are to remain as closed books to the present faculty and students. It may be provided that instead of three full-time faculty members, there should be some other number. Yet this does not insure any better teaching than prevailed before.

One law school dean says that he can get all the full-time teachings he wants at \$1,200 a year, but he fails to state what quality of teachers he expects to secure at this figure. Another worries because he cannot see what full-time men teaching only eight or ten or twelve hours per week are going to do with the rest of their time, while still another solves this difficulty by increasing the teaching load so that the three full-time teachers carry the entire schedule of the whole school and in the spare time remaining inspire liberal art students in various branches of human knowledge.

It is not more quantitative, but qualitative standards that are now needed. One university president asks for an exact interpretation of what will constitute compliance with the required minimum, for, he states, "We do not wish to go beyond this!" It is to be regretted that he could not have been told that there was one more standard, that of a good law school!

### A Visiting Committee for Law Schools

Questionnaires may present something of the physical conditions of a law school, but let no one be deceived by them. They can reveal little of the quality or spirit of the institution. Standards whose observance cannot be set forth in questions and answers are the ones that are most vital.

It is only by personal visits and consultations that the real causes hampering the development of a particular school can be discovered and corrected. This Association because of the very nature of its organization and the independence with which it can act is best fitted to render effectively and understandingly this service to the law schools of America that comprise its own membership.

Its activities in the past in dealing with law schools can hardly be described as strictly professional, but have been limited largely to the ministration of a mid-wife in bringing schools into the

organization, or to those of an undertaker who officiates at the funeral exercises. There is great need of a more professional service to remedy ills of greater or lesser importance, to keep contagion from spreading, to perform rather frequently a minor, and occasionally a major operation, if the general conditions of legal education are to be materially and rapidly improved.

Needless duplication of effort should be avoided, but the field of preparation for practice is so broad, and the amount of work to be done so great, that there need be little fear of such a result. Improvement of the quality of legal education involves more than mere standardization. The law school missionary field should be distinctly the province of this Association.

The causes of the failure to advance lie sometimes with the law school itself, sometimes with the administration of the university, and occasionally with both. There is often lack of understanding on the part of the dean of the developments that are taking place in the law school world, and there is often lack of sympathy and understanding on the part of the university administration as to the requirements and needs of a good law school. All of which spells a poor quality of product turned into the profession.

Many schools need protection from various influences which induce or permit the university administration to force upon them instructors and policies chosen not in the interests of legal education, but dictated by expediency or political pressure. There are schools in which the faculty can neither pass upon academic problems and policies nor exercise their judgment in the interests of better conditions. There are law school deans who have no knowledge, control, or influence over the salaries of the members of their faculties and who are not even consulted on questions of appointments to or dismissals from the teaching staff.

In not a few institutions there is great pressure upon the law school to make it a source of revenue or at least self-supporting, and faculty rulings which cause added expense or deprive the schools of a few students are looked upon by the administration with disfavor and as a cause for censure. There is no help to be given where the law school is used as a means of support for other departments while depriving it of needed resources, or where it is dealt with unfairly as compared with other departments of the university in the allotment of funds.

Periodic visits of a missionary nature could bring to such schools help, encouragement, and inspiration, if that is their need, or through criticism or suggestions accomplish the improvement or correction of conditions which for local reasons it is difficult or impossible to remedy without outside assistance. This is but another way of saying that some test of the quality of the work of the law school and of the instruction given to students should be applied.

As a legal educational organization there are two main fields of activity for this Association. Through its annual meetings it gives opportunity for full discussion and exchange of ideas on the



Members of the Committee of Direction for the Study of the Administration of Justice in Ohio, which is being carried out by the Institute of Law of The Johns Hopkins University in cooperation with the Judicial Council of Ohio and the Ohio State Bar Association. From left to right: John A. Elden, Cleveland, President Ohio State Bar Association; Dr. Leon C. Marshall and Dr. Hessel E. Yntema, members of the Institute of Law; Chief Justice Carrington T. Marshall, Columbus, Chairman of the Judicial Council of Ohio.

purposes and methods of legal education, and the approach to the study and teaching of the law. It is of inestimable value to legal education that by these meetings law teachers and administrators throughout America secure a realization of the wholesomeness of constant experimentation in administration and methods of teaching; that they are induced to become a part of the rising tide of research; that they become aware of the undercurrents of contemporary political, economic and social movements which are affecting the growth and development of the law; and that they be made to feel a sense of personal responsibility for the successes and failures in the administration of justice.

The second field of activity, that of improving the actual conditions existing in the law schools that comprise the membership of this Association, is of equal importance. In this way may be made effective in greatest degree the modern development in legal education. If there is a duty and a service to be performed, the means of accomplishment must be found.

The vital concern of legal education is the student who is to be the lawyer of tomorrow. To this end the Association of America Law Schools is an organization of schools and not of teachers, and its interest in the law teacher is only as he is necessary to the fulfillment of the one object of this Association, "the improvement of legal education in America, especially in the law schools."

## CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

### Among Recent Books

**D**E officio hominis et civis juxta legem naturalem libri duo. Samuel von Pufendorf. English translation by Frank Gardner Moore. 2 vols., pp. 30a., 167; 27a., 152. Index. Oxford University Press, American Branch, New York, 1927. \$4.00.—This book is the tenth in the series of "The Classics of International Law," published under the auspices of the Carnegie Endowment for International Peace. In our time, when the knowledge of Latin occupies a comparatively small part of the curriculum of American students, the Endowment renders a real service in making available to students of law the masterpieces of the forefathers of our legal science. The works of Ayala, Bynkershoek, Gentili, Grotius, Vattel, Victoria and Zouche which have appeared previously in this series call, primarily, for the interest of international lawyers. Pufendorf's work, on the "Duty of man and citizen according to the natural law," rightly claims the interest of every student of law because it is one of the most able and most systematic expositions of the principles of natural law,—of that school which exercised such a profound influence upon the juristic thought of both the civilians of Continental Europe and those trained in the Anglo-American common law.

The contention that this work is of interest not only to students of international law but also to students of law in general is based on the fact that the greatest part of the two books into which Pufendorf divided it, is devoted to private and public law. The first book deals with the duties of individuals,—duties of man toward God, toward himself, toward his fellow man. The second book deals with the individual as a societal unit, and considers the duties devolving on him in his family relations and as a member of the politically organized community, the State. It is only at the end of the second book, in Chapters XVI and XVII, that Pufendorf takes up public international law proper, and speaks of the laws of war and peace and of alliances. As Professor Schücking remarks in the introduction to this publication, the method used by Pufendorf in this work, is "an ingenious idea for the structure of a legal order exhausting all the relations of life. Through the whole there extends as the fundamental idea the ideal of the social man whose conduct is determined by the fact that man is not alone in the world and that his conduct must be conditioned by the necessities of community life." (Vol. II, p. 15a). Professor Schücking's concise characterization puts into sharp relief the value of Pufendorf's work. Although an exponent of a juristic school widely different from those of today, he proceeded on the same basic considerations which underlie the twentieth century sociological jurisprudence.

As in all previous publications of this series, the first volume is a photographic reproduction of an early

edition; in this case that of 1682 of the *Officio hominis* (the first edition was published in 1673, a year after the publication of his great work, *De jure naturae et gentium libri octo*). The second volume contains the very able and meticulously careful translation by Frank Gardner Moore, professor of Latin at Columbia University. The analytical introduction written by Professor Walther Schücking of Berlin adds great value to the book.

FRANCIS DEAK.

Columbia University Law School.

*The Law and Practice of Libel and Slander.* By Clement Gatley, London: Sweet & Maxwell, Ltd., 1929. Pp. cxli, 1039. This is a second edition and a revision. While it is doubtful whether there would be any demand for a new work on this subject, there is every justification for a second edition of a work already written, and a revision of same to bring before the bench and bar the numerous decisions which have been rendered by the courts of English speaking nations during the five years which have intervened since the publication of the first edition. The text of the second edition makes no change in the classifications or analysis of the subject, but is rather confined to the judicial evolution of the past five years. In appraising any law book written by an English author it is important to ascertain its value to an American practitioner. It is distinctly an English work and essentially more valuable to the English bench and bar by reason of its rather exhaustive citation and discussion of English authorities. While there are all told approximately seven hundred American cases cited and discussed, the American citations are only a fraction of the whole number of American cases on this subject. The work cannot therefore, be classed as an exhaustive one for the use of American lawyers, and yet it must be said that the author has had a fine sense of discrimination in selecting important and well considered cases and that some American authorities are cited on practically every important subject.

The work shows an honest endeavor to state the law as it is, without any attempt on the part of the author to impose his own views, and upon those propositions where authorities radically differ the opposing theories have been fairly presented. The style of the work is lucid and concise, and although quotations are sometimes woven into the text, it is made to read in a continuous unbroken narrative.

The work will find its chief value to American lawyers and courts in cases of sufficient importance to justify a thorough search of English authorities and a fair and philosophical discussion of principles as announced by the English courts. While the work will probably not find its way into the small library of the

average lawyer in this country, certainly no library would be quite complete without it.

The value of the work in American jurisdictions is enhanced by the fact that the fundamental principles of the law of libel and slander are universal in their application to all countries where the common law prevails and that the development of those principles has generally been consistent and uniform.

The author himself prefaces his work by a statement of his employment of American citations. While opinions upon this branch of the law differ, as they do on all other branches, it rarely happens that the courts of England are aligned on the one side and American courts on the other. In those rare instances the author has called attention to the contrariety in footnotes, and while holding to the English view, has cited the American authorities holding the opposing view. In other instances, where there is no English authority, the author submits his view of the law in the text and cites the American authorities in support thereof. An examination of a very large number of the cases cited discloses that the author is accurate in his citations and that they either support or oppose the text, as indicated.

American text-books and cyclopedias of law cite a multitude of American cases which are not cited by Gatley, yet as a profound discussion of fundamental principles the work of Gatley must be conceded to stand preeminent. Concerning American citations the author makes the following prefatory statement:

"I have also carefully gone through the cases collected in the American Century and Decennial Digests, and have incorporated a large number of the more important, among which are several illustrating novel or doubtful points of law. In a few of these cases I have had to rely on the accuracy of the headnotes in the Digests. With the exception of these few cases, I have read the report of each case itself before including the case."

One of the chief elements of value in any text-book is the index. It will be found that in this particular work the headings are suggestive and the index unusually helpful.

CARRINGTON T. MARSHALL.

Supreme Court of Ohio.

*Cartels, Combines and Trusts in Post-War Germany*, by Rudolph K. Michels. 1928. New York: Columbia University Press. Pp. 183.—When the sweep of American business consolidation augurs death for the small producer, a system which saves him exacts analysis. The German "cartel" gives him the advantages of the American merger: the power to fix the prices of competitors and to control production. It is similar to our trade associations but possesses other and greater powers, such as price-fixing and control of out-put. The contour of such trade mechanics, and their structure, the cartel, are nicely traced in Dr. Michels' book. True, the usual statement of American law would forbid such organizations here, but when the silhouette of the cartel is drawn against the background of the consolidation or its parent, free competition, one must question the worth of the accepted American law. If the book does no more than pose such an inquiry, it deserves to be read.

The author portrays the striking use of cartels in Germany. He estimates that in 1927 the number of price-fixing cartels totalled "about 550 to 600" (p. 173). Cartels of other types numbered between two and three thousand. Some cartels, like the *Halbzeug-Verband* in the steel industry, handle all sales of members' goods, place among the membership the filling of

orders, collect and distribute proceeds, and possess the exclusive right to sell members' products (p. 101). Other cartels are less highly organized. Cartels practically control the coal, steel and potash industries. In fact, "Germany today is covered by a network of cartels and similar express or implicit agreements" (p. 174).

The German law, in stark contrast to American, favors the cartel, upholding contracts "to limit the amount of output or to sell goods at a certain price" (p. 23). The significance of this policy is that it "preserves small financially independent business enterprises which otherwise would have been forced into bankruptcy or absorbed by the few big enterprises" (p. 17). The danger is that a weak member may be nursed along at the expense of the public. But in one case at least (the potash mine closing law of October 22, 1921) the government has tried to avoid this in giving itself the power to investigate uneconomic mines and close them by decree. Likewise, government supervision of all cartels is gained by the cartel law of November 2, 1923. A special cartel court can quickly strike at anti-social cartel proceedings. Upon application of the Reichswirtschaftsminister the cartel court may in fact void cartel regulations if public welfare is endangered by them. Instances of this are when production or sale are unjustifiably curtailed, prices raised to a high level, economic freedom unfairly hampered, discrimination in prices or conditions imposed. Thus German law favors cartels and regulates them.

Dr. Michels concludes that the cartels have stabilized prices, at least to some extent. A chart reproduced on page 176 shows, for instance, that in the period from January, 1925, to March, 1927, "English and American prices of pig iron fluctuated ten times and three times as widely as the German prices." Price stabilization reduces risk. Expensive capital equipment installed at a high price is not periodically thrown into disuse by a lower price. Flux in industry and in capital goods, which is tremendously costly, is eliminated. Dr. Michels agrees with Stockder, who previously had written "By and large results were satisfactory, and German coal mines were operated day by day, week by week, and month by month much more steadily than those of other great industrial countries." (Stockder, *German Trade Associations*, p. 244).

It is true that American law, based on Adam Smith's conception of free competition, has in the past forbidden price agreements among competitors. But the reviewer believes that the absoluteness of this idea of free competition has been time and time again pierced even by the courts. The Supreme Court itself has been impressed by the value of the stability in price which is the justification of the German cartel system. Receding from previous more extreme views, it now permits competitors to give each other, through a trade association, all manner of data about their business, prices and internal affairs. The court recently said:

"Competition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into a commercial transaction. . . . It was not the purpose or intent of the Sherman Anti-Trust Law to inhibit the intelligent conduct of business operations. . . ." (*Maple Flooring Manufacturers' Protective Association et al. v. United States*, 268 U. S. 583.)

This is a far cry from the words of the father of free competition who said, "People of a trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public or some contrivance to raise prices." (Adam Smith,

An Inquiry Into the Nature and Causes of the Wealth of Nations, 10th ed., Book I, Chapter X, p. 200.)

Moreover, the desire to stabilize the agricultural market and to banish from it "dumping" and price fluctuation induced the legalization of cooperative marketing. Like the cartel, the cooperative marketing association sets prices for the output of competing producers, resting upon the idea that stability is more valuable than competition. In accepting these combinations the courts grafted another exception upon the universalism of free competition and the censure of price-fixing. The law has also approved labor unionism, which sets prices for the commodity of its members (labor) much as a trade association would fix prices for producers.

The Supreme Court, then, permits trade associations to supply competitors information which furnish the basis of prices. It permits marketing associations and labor unions to set prices for competitors. Yet, oblivious to these retractions, it only recently said that it has assumed "any agreement for price-fixing, if found, would have been illegal as a matter of law" (*United States v. Trenton Potteries Co.*, 273 U. S. 392, 400). It held a price-fixing scheme of a trade association *per se* illegal as violating the unquestioned rule of free competition. Yet its past decisions have in certain situations discarded this very rule of free competition. The court speaks the magic words "free competition", and evades examination of the true question in each case: do the economics of the industry call for a competitive or a stabilized market?

The history of religions shows that a magic formula chanted to cure a temporary ill is often repeated for centuries after the evil is eliminated. Fear of invoking the wrath of the gods prevents any change in the formula. The grave of these meaningless dead words is ritual.

The opinions of the Supreme Court must not become loaded with ritual. One wishes that before a trade association case were decided the members of the Court could read such a book as Dr. Michels'. The old sweeping assumption that *every* price-fixing agreement is illegal may not survive new probing.

The reviewer names Dr. Michels' book because it is an excellent summary of the present German situation. It is thoroughly readable. While it does not have the detail of Stockder's "German Trade Associations", it is not so much confined to a single industry, but covers the entire field. Perhaps other works may better analyze the historical background of the cartel movement. (There are some excellent comparisons of the history of German and English combination in Herman Levy, "Monopolies, Cartels and Trusts in British Industry," Chapter IV, p. 73). But the reviewer knows of no better general work covering the whole subject.

MATTHEW O. TOBRINER.

San Francisco.

*Proceedings of the Third Conference of Teachers of International Law.* 1928. Washington: Carnegie Endowment for International Peace. Pp. ix+201.—This conference, which was attended by nearly a hundred teachers of international law, was held at Washington, D. C., on April 25-26, 1928, under the chairmanship of Professor Edwin D. Dickinson of Michigan. The chief problems discussed related to the aim and scope of courses in international law in colleges, graduate schools, and law schools, respectively; to the place that should be accorded in the curriculum to the laws of war and neutrality; and to facilities and methods of research in the subject. Two papers contributed

by Professor Manley O. Hudson of the Harvard Law School on *The Department of State and the Teaching of International Law and International Relations* and *The Teaching of International Law in America*, are annexed to the proceedings of the conference. The latter, after an interesting historical account of the development of American methods of teaching international law and of the growth of an American literature on the subject, concludes that the complexity of modern world society demands a more strict professionalization of the teaching of international law on the one hand, but on the other hand, a closer collaboration between students of international law and students of other aspects of international life, such as trade, communications, and finance.

The Conference charged a Committee to make representations with a view to the enlargement of the scope of the publications of the Department of State; and it must be gratifying to its members to know that Congress has since appropriated a sum of \$50,000 for this purpose. The conference also decided to approach the Carnegie Foundation with a project for undertaking a continuing publication of the decisions of municipal courts throughout the world on points of international law. The wealth of material that has hitherto been wasted owing to the inaccessibility of these decisions has been revealed since the conference met by the publication by Messrs. Longmans of the first volume of an *Annual Digest of Public International Law Cases* under the editorship of Dr. A. D. McNair and Dr. H. Lauterpacht. An English reviewer, whom the proceedings of this conference leave with a strong impression of the liveness of the study of international law among his American colleagues, may be excused a feeling of slight gratification that in this important service at least the lawyers of his own country have "jumped the claim." J. L. BRIERLY.

Oxford, England.

*The Milligan Case*, edited by Samuel Klaus (in *American Trials* series). 1929. New York: Alfred A. Knopf. Pp. 476. The editors of *American Trials* chose well when they selected *The Milligan Case* for the first volume of what promises to be an interesting and instructive addition to legal literature. No lawyer is equipped to meet his full responsibility to the public, which expects his leadership in government, unless he is familiar with those great trials that tested the very foundation pillars of human liberty. This new series of interesting cases in American jurisprudence furnishes the lawyer the opportunity to study the terrific struggle to preserve the blood-bought liberty of which we are the heirs.

The Milligan case arrests your attention at once. You are astounded that in free America men temporarily clothed with power would tear down every safeguard of human liberty to assure punishment of one guilty of crime. This case pictures vividly the extremes to which honest and patriotic men will go when they are blinded with the justice of the cause they represent.

Lambdin P. Milligan, an Indiana lawyer of ability and prominence, was seized by military authorities at his home in Huntington, October 5, 1864, and taken to Indianapolis and held in prison as a military prisoner. He was not in the military service and had not during the rebellion been in any of the seceding states. The federal and state courts were open and were functioning regularly; but Milligan was denied a civil trial. He was arraigned before a military commission on charges of sedition and treason and after a mock trial

was sentenced to death. The hearing in the federal courts was on a petition for a writ of habeas corpus.

In *Ex parte Milligan*, 4 Wallace 2, the United States Supreme Court affirmed that the civil liberties guaranteed by the Constitution are to be safeguarded no less in the fever of civil strife than in the calm of peace, and definitely proclaimed the power of the civil courts to call to account other tribunals of every nature and pretension. Extraordinary as it may seem, provisions of the bill of rights expressed in language so simple and direct that it would seem no one of reason could doubt their meaning were challenged by the government's spokesmen and branded as mere Utopian declarations suited only for adornment of occasional oratory. No monarch ever claimed more unrestrained authority over his subjects than was claimed for our chief executive. But again the friends of human freedom triumphed and another great victory for constitutional liberty was recorded.

The introduction by the editor, Samuel Klaus, paints a picture of defiance of the courts by the military authorities that makes one contemplate the future of our institutions with some misgivings. Some of his statements are too general. For instance—"From Sumter to Appomattox constitutional issues signified little. In that space of time the conduct of the federal government was not only not constitutional, it was essentially extra-constitutional; in fact, it was essentially unconstitutional." Such a wholesale condemnation of the conduct of the federal government in this civil strife is no more justified by history than a blanket approval. Notwithstanding the extravagance of this editorial comment, the historical data collected in the introduction furnish much food for thought. It is well worth reading.

The arguments for the petitioner, by James A. Garfield, a general in the Union army and later president of the United States, Jeremiah S. Black and David Dudley Field, two eminent members of the bar, were masterly expositions of American constitutional government. Not one of these champions of human liberty had the slightest sympathy with his client or the seditious practices of his client. Their interest was wholly impersonal. They volunteered their services in a cause which was bigger than any man or set of men. They were fighting to preserve to future generations what was gained for them at Runnymede and Yorktown. They were big enough to appear for an unworthy man to champion a worthy cause. Their compensation must be the gratitude of the friends of constitutional government.

FLOYD E. THOMPSON.

Chicago.

*Government and Business*, by Earl Willis Crecraft, 1928. New York: The World Book Company. Pp. xi, 508. In an age when the leaders of thought in the field of law are integrating their work more and more with that of workers in other social sciences various types of books may be expected to appear. The present volume is a brief running commentary upon certain types of legislation written from the standpoint of the political scientist. To a layman, or even a lawyer, who wishes to obtain a brief review of governmental activities affecting business the book would have undoubted value.

"Business," however, is a broad term. The author writes that it "implies the wealth-getting and want-supplying activities of mankind. By one's business is

meant his occupation, regardless of whether he engages in a profession or a trade; works in a factory or a mine; or whether he is a farmer, a merchant, or a participant in any other form of economic activity. It is a broad term; it includes not only merchandising, but production, consumption, and exchange in general; it is frequently used interchangeably with 'industry,' or it may be applied to the different uses made of private property." (p. 2.)

Thus a treatment of the relation of government to these almost all-embracing human activities becomes a treatment of an immense sector of law. A thoroughly worked out professional discussion of the legal problems involved would require many times the space available in the work under review, and for that reason alone it may be assumed that but little technical use can be made of it.

Further examining the book and regarding the breadth of legal subject matter involved in it, one may say that it gives relatively small space to the technical legal problems which occur in the process of putting law in books into action, i. e., in the application of law. This brevity, however, is readily understood when it is recalled that the author's focus is upon the abstract outlines of government and business rather than upon details of law enforcement.

It is worthy of comment that certain very real difficulties which would ordinarily give pause to the lawyer are not given deserved consideration in the text-book at hand. Thus in discussing the public service commissions the author asserts that the "consumer must have an advocate." He adds that a certain attorney-general "has an odd conception of his official duty when he regards the public utilities commission merely as a 'neutral' and regards the consumer as competent to be his own advocate. . . ." (p. 83.)

The book is worth reading as a political scientist's discussion of certain aspects of law. The legal profession is seeking intelligent criticism of the growth of law and its application to human affairs. The opinions and inferences of the author, therefore, furnish food for thought. Very careful search among statutes and learned articles as well as abstract treatises is evidenced by the type of materials to which frequent references are made. There is, however, very little case citation. An excellent bibliography and a good index are appended.

It is altogether likely that the book will have a considerable use in social science courses other than those offered in the law schools. The writer feels that few, if any, business or professional men would find it useful as a reference book.

C. M. UPDEGRAFF.

State University of Iowa School of Law.

*Trade Associations: The Legal Aspects*, by Benjamin S. Kirsh. New York: Central Book Co. 1928. Pp. 271.—The centripetal and centrifugal forces in modern business are the merger and trade association movements. The day of the lone trader draws to a close. Peculiarly enough, it is associational activity on the part of independent tradesmen rather than the consolidation of separate business enterprises into compact, powerful units which has been most frowned upon by the courts, although of the two the former is more compatible with the professed ideals and aims of a political democracy.

From the standpoint of industrial efficiency, the merger probably has the advantage over the associa-

tion. In fact, the trade association is not infrequently a makeshift to stem the irresistible tide towards consolidation; sometimes it is merely the prelude. But there are other considerations besides the economic which must be taken into account. The merger movement presents many perplexing problems of social control which promise to become increasingly troublesome. The evils of the unsound financing attending many such projects are still fresh in mind. The political and social implications of such phenomena as the separation of control and ownership, the concentration of economic power in a few, the decrease of the enterpriser with the concomitant increase of the employee class, the organization of industry along the lines of an economic feudalism are far-reaching. While these tendencies need not necessarily fill us with alarm, we cannot ignore the fact that they do not harmonize with the basic tenets of a political democracy.

Not so with the trade association. The enterpriser of the classical economists retains his dominant position. The gap between manager and worker can still be bridged. Economic power is more widely distributed. The industrial unit is smaller and more personal. Society tends to have a more distinctly bourgeois flavor. The regnant philosophy is one of rugged individualism.

But rugged individualism is not an unmixed good. The wastefulness of unrestrained competition needs no elaboration. An excess of competition tends to force prices below cost; ruinous credit concessions are given to customers; the improper practices of buyers are of necessity condoned; in the struggle for existence savage competitive methods are resorted to; trade morality descends to the lowest depths; patents and trademarks are infringed; the trade values of competitors are wantonly appropriated. Disorganization results, and frequently chaos. Competition, the *summum bonum* of an earlier period, it becomes evident, can no longer be relied upon as the sole regulator of business. Cooperation and organization are necessary if the complex economic problems and forces are to be coped with. And yet, the slightest attempt at cooperation results in a direct collision with the common and statutory law of restraints of trade.

It is with the legal problems which thus arise that Mr. Kirsh is concerned. He treats rather fully the legal aspects of such associational activities as the collection and dissemination of statistics, the adoption of uniform cost accounting methods, the interchange and cross-licensing of patents and the establishment of association credit bureaus. Additional chapters are devoted to a study of the foreign trade functions of associations, collective purchasing, standardization of products, and the part played by associations in the betterment of trade ethics.

To one not familiar with the history and development of the doctrine of restraints, the attempts of Mr. Kirsh to prove the legality of some of the sensible and rational practices of many associations might seem like the straining after so many gnats. How many of them could possibly be questioned must be a perennial source of wonder to the impatient business man. But the legal problems in this field are not so lightly to be disposed of. Their complexity and difficulty can only be appreciated by one thoroughly grounded in the law of restraints and combinations. History here plays a

major role. If one is interested, as most lawyers are, in the prediction of judicial decision, one must be prepared to wrestle with a long line of obscure cases as well as statutes of uncertain intent. The economic justifications of associational activity, which the author presents with great skill, although at times with the zeal of the business apologist, cannot be relied upon apart from the cases themselves. No one is more aware of this than the author, and in no book on this subject can we find a better integration of legal and economic data. But while the case law on the subject is handled in lawyer-like fashion and problems upon which there is little or no law treated quite ingeniously, the discussion could have been more useful had it been more analytical and had more space been given to a consideration of the many crucial cases which are yet to be decided, and which when decided must necessarily affect the entire body of law in this field. The treatment by the author assumes a syllogistic form which is apt to be misleading. His initial premise is that an agreement though restrictive of trade is lawful if the restraint is reasonable. This takes the form of a generalized statement of the rule of reason buttressed by liberal quotations from the leading cases. Reasonableness is then shown by an enumeration of the various economic justifications for the particular agreement or practice. Now while this method places the problem in its proper economic setting, it fails to bring out some of the inherent difficulties which become apparent upon a more incisive analysis. This is certainly true of the chapter on patent interchanges and cross-licensing agreements. The legality of a multi-lateral licensing agreement cannot be adequately determined until the rights of the patentee and licensee under a simple agreement are thoroughly explored, the progression being from the simple to the complex. Only in this way can one be certain that all the problems lurking in a complicated license have been isolated.

Limitations of space do not permit of a more detailed discussion of the contents of this book. The chapter on trade relations reveals that much remains to be done by associations in the improvement of trade morality. From the standpoint of its members, it is not difficult to justify the existence of such organizations. The dissemination of statistics, the establishment of credit bureaus, patent interchanges and the like serve the interests of the members of the association. The benefit to the public at large is at best indirect if not problematical. The rhapsodies of the sponsors of associational activity and the prophets of the new order would be more convincing, the justification from the standpoint of the public for associations more real, if these organizations would actively and earnestly strive for higher standards of trade ethics. It is not enough to put out glittering codes of ethics handsomely embossed upon sheepskin. Machinery for their enforcement must be established. Trade associations cannot expect favorable concessions from the law until they have proven their capacity for social good as well as the advancement of their own private interests.

Mr. Kirsh has written a very useful book. His treatment of these complex questions is always lucid and unequivocal. He does not run away from difficulties by hiding behind pretty phrases. He has made a real contribution to the literature on the subject. The practical realism of the book make it of inestimable

value to the trade association executive as well as indispensable to the practitioner, both of whom will find in the book the answer, so far as there is any, to most of their problems.

MILTON HANDLER.

Columbia University.

## Leading Articles from Current Legal Periodicals

*Illinois Law Review*, February (Chicago).—The Doctrine of Worthier Title, by Fowler V. Harper and Frederick C. Heckel; An International Congress of Comparative Law in 1931, by Edward Lambert and John H. Wigmore; Old Rights of Discovery in Modern Federal Court Practice, by Horace Dawson; Röntgenograms and Their Chronologic Legal Recognition, by Orlando F. Scott.

*Law Quarterly Review*, January (Toronto, Can.).—Contracts for the Benefit of Third Persons, by Professor Arthur L. Corbin; The Annual Digest of International Law Cases, by the Right Hon. Sir Frederick Pollock; Roman Law and the Custom of London, by Walter G. Hart; The Borough of Southwark, by G. D. Muggeridge; Undivided Shares in Land, by Harold Porter; History of the Parliamentary Declaration of Treason, by Professor Samuel Rezneck.

*Canadian Bar Review*, January (Toronto, Can.).—Judicial Appointment, by W. H. Trueman; Child Trespassers, by A. L. MacDonald; Uniformity of Legislation, by R. W. Shannon; Dominion Status, by J. C. Anderson.

*Harvard Law Review*, January (Cambridge, Mass.).—Federal and State Court Interference, by Charles Warren; The Federal Courts and State Regulation of Public Utilities, by David E. Lilienthal; The Use of the Federal Injunction in Constitutional Litigation, by John E. Lockwood, Carlyle E. Maw and Samuel L. Rosenberry.

*American Journal of International Law*, January (Washington, D. C.).—The Interpretation of Treaties by the Permanent Court of International Justice, by Charles Cheney Hyde; The Eighth Year of the Permanent Court of International Justice, by Manley O. Hudson; The Hague Conference on the Codification of International Law, by Jesse S. Reeves; Nationality: Jus Soli or Jus Sanguinis, by James Brown Scott; Territorial Waters as a Test of Codification, by Richard W. Hale; The Closure of Ports in Control of Insurgents, by Edwin D. Dickinson; Violations of Maritime Law by the Allied Powers During the World War, by E. G. Trimble.

*University of Pennsylvania Law Review*, February (Philadelphia, Pa.).—Recovery of Property by Trustees in Bankruptcy in the Federal Courts, by Fowler Vincent Harper; Res Judicata; Unsatisfied Judgments in Trover, by Joseph A. McClain, Jr.; Some Prohibition Forfeiture Cases—The Doctrine of Vicarious Liability, by Forrest Revere Black.

*Boston University Law Review*, January (Boston).—Presidential Declarations of Independence, by Charles Warren; Massachusetts and Censorship, by S. S. Grant and S. E. Angoff.

*Virginia Law Review*, November (University, Va.).—Mining and Sapping Our Bill of Rights, by Sterling E. Edwards; Copyright and Radio, by W. Jefferson Davis; The Fortune-Teller Again, by Blewett Lee.

*Virginia Law Review*, January (University, Va.).—Seven Implications of *Swift v. Tyson*, by Armistead M. Dobie; Railroad Rates and Revenues, by Samuel W. Moore; The Two Fundamental Concepts of Arbitration and Their Relation to Rules of Law, by Geo. Gordon Battle; What a Jury Is, by Thomas James Norton.

*Law Notes*, January (Northport, N. Y.).—The Farce of Enforcement, by Courtlandt Nicoll; Important Phases of the Law of Interstate Extradition, by George S. Elperin; Aerial Navigation, by Charles C. Moore.

*United States Law Review*, January (New York, N. Y.).—Perjury in Judicial Proceedings; Gifts from the Estate of an Incompetent; The Cradle of Western Law, by Charles Sumner Lobingier.

*Alabama Law Journal*, January (University, Ala.).—Extent of the Right to Apply Collateral Securities to Other Debts, by Whitley P. McCoy; Suggested Changes in Real Property Law for Alabama, by Wm. Alfred Rose; A Session on Presumptions, by J. H. Moore.

*Michigan Law Review*, January (Ann Arbor, Mich.).—The Proper Rule in Fluctuating Exchanges, by Joseph H. Drake; Judicial and Administrative Control of County Officers, by John A. Fairlie; Certificates of Convenience and Necessity, by Ford P. Hall.

*Yale Law Journal*, January (New Haven, Conn.).—The Indian Problem and the Law, by Ray A. Brown; Gifts Over on Death Without Issue, by Joseph Warren; Labor's Resort to Injunctions, by Edwin E. Witte.

*Southern California Law Review*, December (Los Angeles, Cal.).—Liability Under Trusts to Creditors of Trustor, by Frederick R. Behrends; Sovereign Rights and Relations in the Control and Use of American Waters, by Ernest C. Carman; Transmigration of Oil and Its Problem, by George H. Bowen.

*University of Pennsylvania Law Review*, January (Philadelphia, Pa.).—Extra-Judicial Administration of Insolvent Estates: a Study of Recent Cases, by Thomas Clifford Billig; The Nature of the Consular Establishment, by Julius I. Puente; Some Legal Aspects of Life Insurance Trusts, by John Hanna.

*Kentucky Law Journal*, January (Lexington, Ky.).—Third Party Beneficiaries in Kentucky and the Restatement, by Alvin E. Evans; Equity as a Concept of International Law, by Lester B. Orfield; Negligence in the Operation of Aircraft, by James W. Stites.

*Minnesota Law Review*, January (Minneapolis).—Aesthetics in Zoning, by Charles P. Light, Jr.; Death of a Drawer of a Check, by L. W. Feezer; The Legal Nature and Status of the American County, by Charles M. Kneier.

*Law Notes*, December (Northport, N. Y.).—Inter-State Exchange of Witnesses in Criminal Cases, by George Z. Medalie; The Court of Admiralty in Legal History.

*The Journal of Air Law*, January (Chicago).—Germany and the Aerial Navigation Convention at Paris, October 13, 1919, by Dr. Alfred Wegerdt; Carriage of Passengers by Air, by Edward A. Harriman; Public Utility Air Rights, by Theodore Schmidt; The Certificate of Convenience and Necessity Applied to Air Transportation, by Thomas H. Kennedy.

## Meeting of Delegates from Official State Bars

THE Chairman of the Conference of Bar Association Delegates, Mr. Thomas C. Ridgway, announces a meeting under the auspices of the Conference of delegates from official state bars, and others interested in state bar organization. The meeting will be held on May 7, the day preceding the annual meeting of the American Law Institute, in the Mayflower Hotel, Washington. There will be a forenoon session, beginning at ten o'clock and a luncheon following.

The purpose of the meeting is to afford opportunity for an exchange of experience among the delegates representing state bars organized under statutes, for a discussion of common problems and to arrange for the drafting of a Uniform State Bar Act. The state bars to be represented are those of Alabama, California, Idaho, Oklahoma, Nevada, New Mexico and North Dakota.

The meeting will be an open one in the sense that all lawyers and judges interested in the subject will be welcome. The members of state bar association committees on bar organization are especially invited. There is no doubt that attendance will be very informative.

There will also be, in the same week, a meeting of the Council of the Conference of Delegates and also a meeting of its committee on Re-organization of the Bar, of which Mr. Philip J. Wickser is chairman.

All intending to be present at the conference are requested to notify the secretary, Mr. Herbert Harley, 3017 44th Place, Washington.

# THE SPECIAL VERDICT AS AN AID TO THE JURY IN CIVIL CASES

Results of Inquiry as to Procedure in Various States with Reference to General and Special Verdicts—Views of Bench and Bar on Supposed Difficulty of Properly Framing Special Issues—Frequency of Use in Different Commonwealths, Etc.\*

BY JOHN W. STATON

*Past President Maryland Bar Association*

THE special verdict is not new. Like Abraham when Isaac was born it is "full of years."

Whatever merit there may be in the jury system as a whole by reason of the fact that it is a venerable institution may with equal force be applied to the Special Verdict. It is a product of the Common Law. The Statute of Westminster 2, 13 Edw. 1, C. 30, Sec. 2, enacted in 1286, was merely declaratory of what had long existed. Blackstone tells us "sometimes if there arises in the case any difficult matter of law, the jury, for the sake of better information and to avoid the danger of having their verdict attainted, will find a special verdict, which is grounded on the Statute of Westminster 2, 13 Edw. 1, C. 30, Sec. 2, and herein they state the naked facts as they find them to be proved and pray the advice of the Court thereon; concluding conditionally, that if upon the whole matter the Court shall be of opinion that the plaintiff had cause of action, they find for the plaintiff—if otherwise, then for the defendant. Blackstone 9 Ed. Vol. 4, p. 377 (Burn).

The special verdict had its origin in the fear by the original trial jury of a jury of attain. In the early days if the jury brought in a general verdict which in the mind of the Judge was not a proper one, the "Jury of Attaint" was summoned. If the Attaint Jury found a different verdict from that of the first jury, the first jury were deemed guilty of perjury and were severely punished. Some wise juror conceived the idea that the danger thus confronting the original jury might be avoided by declining to bring in a verdict either for the plaintiff or for the defendant but to return to the Court only a finding of the facts and, as Blackstone says, pray the advice of the Court thereon.

It was held in Pennsylvania in *B. & O. R. R. Co. vs. School District 3 Pennypacker* (Pa.) 518 that in States where no specific statutory provision on the subject exists, special verdicts may be found as of Common Law, but the Court is not justified in directing the jury to find a special verdict though it may in its discretion in a proper case recommend one.

One feature of the Common Law Special Verdict has been in some States improved by statute, and may yet be much further improved. Under the Common Law all issues, even those that were undisputed and uncontroverted, must be passed upon. In Texas this has been modified by eliminating that

necessity and creating the conclusive presumption that every issue not included in the issues of fact submitted to the jury for their finding was found to support the judgment, provided there is evidence to sustain it.

It is not a new practice in Maryland. Findings of fact by the jury, passing the question of law to the Court, are found in our Reports as far back as 1 H. & McH. 26 (1705). This was an action of ejectment, in which the jury, after reciting their conclusions on various facts, said:

"If the Court do not think Walter Beam's patent duly vacated, we find for the plaintiff, otherwise for the defendant." This is followed on page 28 in the case of *Lloyd's lessee vs. Hemsley* (1712) in which the jury said: "We of the jury do find for the plaintiff if the Honorable Court are of opinion that the Statute of Twenty-first King James the First, entitled 'an act for limitation of actions and the avoiding of suits a law', do not extend into this province and be not applicable to this cause, otherwise we find for the defendant."

In *Gover vs. Turner*, 28 Md. 600, the Court of Appeals said "the jury have a legal right to find a special verdict and submit any question of law to the Court, and if they think proper to do so, the Court cannot properly refuse it," and that "a special verdict is where the jury find all the facts in the case, referring the law arising on such facts to the decision of the Court and concluding conditionally that if upon the whole facts found the Court shall be of opinion that the plaintiff had cause of action, they then find for the plaintiff, if otherwise then for the defendant." This seems to be the Common Law Special Verdict and there seems to be nothing to prevent its use even now in Maryland if it be so desired. But it is not the common law special verdict that we advocate. It is the special verdict that may be created with that as a foundation.

It is defined by Statute in Iowa, Nebraska and Ohio as one in which the jury finds the facts only, which must present the ultimate facts as established by the evidence and not the evidence to prove them, so that nothing remains to the Court but to draw from them its conclusions of law.

Many of our States have Statutes regulating special verdicts or special interrogatories. Maryland had a Statute along this general line born of the General Assembly of 1894, Chapter 185. Even its mother did not love it. After only six years of existence the little life it had was snuffed out by Chapter 641 of the Acts of 1900, with the general approval of the Bar of the State. But was that

\*Extracts from presidential address delivered at the Annual Meeting of the Maryland Bar Association, held at Atlantic City on June 27-28-29, 1929.

action wise? Should it have been entirely wiped out? Should it not have been enlarged, amended and made workable and effective?

The Maryland Statute was as follows:

"In all cases where issues of fact are submitted to a jury, the court may at its own discretion, or shall, at the request of either party, require the jury, in addition to rendering a general verdict for the plaintiff or defendant, to find specially upon any particular questions of facts material to the issues on trial, which questions shall be in writing; and in all cases at law where issues of fact are tried before a court without a jury, the said Court, at the written request of either party, may find specially upon any question of facts which it may deem necessary to be determined in order to arrive at its verdict. All such special findings of facts, whether by the jury or by the court, shall be in writing, and must be filed with the clerk as part of the record of the case, and in civil cases where a special finding of facts shall be inconsistent with the general verdict rendered at the same trial, the former shall control the latter and the court must give judgment accordingly; but nothing herein contained shall limit the court's power to grant a new trial or to arrest judgment on motion."

It was seldom used and so far as I have been able to find there were only two cases that reached the Court of Appeals in which the use of the special interrogatories was involved. These cases are *Baltimore Traction Co. vs. Appel* 80 Md. 611, in which the interrogatories were not requested until after the argument to the jury, which the Court of Appeals held was too late, and the case of *B. & O. R. R. Co. vs. Cain* 81 Md. 105, in which the Court of Appeals held the refusal of the lower Court to submit certain material issues was an error. In *Central Construction Co. vs. Harrison* 137 Md. 264 the Court of Appeals refers to the Statute as having fallen into such disfavor in the profession that it was repealed.

We still have the special verdict in cases of issues from the Orphans' Court, from Courts of Equity, in cases of caveat to wills and in appeals from the State Accident Commission under the Workmen's Compensation Act. In *Schiller vs. B. & O. R. R. Co.*, 137 Md. 242 and 243, the Court of Appeals held that the provisions of that act seemed to be intended to protect the constitutional right to a jury trial of the facts involved but in such a way as to enable the Court to apply the law to the facts after they are found by the jury, and for the practical working of such a scheme there does not seem to be any method so appropriate as the submission of issues in a manner analogous to the practice in cases sent from the Orphans' Court or from Courts of Equity, where it is desired a jury shall pass on the facts but that the facts submitted as issues should, as far as practicable, be confined to the ultimate issues and not include subordinate issues. In *Central Construction Co. vs. Harrison* 137 Md. 265, the Court said if that is the most appropriate practice to follow, the questions of fact should be framed and presented to the trial Court so they may be passed upon by the Court before the jury is sworn—and in both *Dickson Construction Co. vs. Beasley*, 146 Md. 570 and in *Armour Fertilizer Works vs. Thomas*, 153 Md. 631, one issue disposed of the whole case.

In the effort to learn the procedure in the various other States with reference to verdicts, special and general, and special interrogatories, and how the use of special verdicts or special interrogatories is regarded in those states I have conducted during the last year some considerable correspondence

with leading members of the Bench throughout the country. The Statutes of course could have been obtained by examination of the various State Codes but the reaction of the Bench and Bar could not have been so obtained.

One of the recognized objections to the submission of special issues is the supposed difficulty in their proper framing, so in trying to get the reaction of the Courts and bar of other states that particular query was made and also whether or not their statute was frequently or infrequently used. From this correspondence the following information has been gathered:

Statutes somewhat similar to the Maryland Statute but varying in detail are in force and are more or less used in Arizona, California, Colorado, Indiana, Kansas, Michigan, Montana, Nebraska, New York, Pennsylvania, Rhode Island, South Dakota and Washington.

From California comes the word that it is rather infrequently used and it is just about as difficult to properly frame and submit special issues as to instruct the jury; from Arizona that while it was formerly frequently used it is not now used so frequently because the Bar and Courts regard special verdicts unfavorably and the framing of issues more difficult than the procedure for general verdicts, but in Colorado its use is not infrequent, though not very common, and not regarded unfavorably nor the framing of issues more difficult.

Delaware has a statute that is a model in brevity: "in any case in the discretion of the Court the jury may be required to find a special verdict." It is infrequently used and has received very little consideration from the Courts or the Bar.

Indiana uses the statute frequently, particularly in personal injury cases; it is regarded favorably by the Courts and the Bar and the difficulty in the procedure is not materially different in special and general verdicts. From Kansas the report is that the statute is frequently used and is favorably regarded especially where the jury is liable to be prejudiced, as in personal injury cases against railroads and other corporations, and that perhaps issues are more readily framed than instructions.

In Massachusetts, while the practice permits special verdicts, general verdicts and answers to questions framed by the Court, the special verdict does not rest upon any statute but is the common law special verdict recognized by statute of Westminster 2, 13 Edw. 1, Chapter 30, Section 2, and by Massachusetts G. L. Chapter 11, Section 5, but its use is not very common. Chapter 231, Section 124, Massachusetts G. L., passed in 1913, provides that when special questions are submitted to a jury the Judge may or may not take a general verdict and may report the case on the answers of the jury or may make such other order thereon as he deems proper. This statute, says Chief Justice Rugg, of the Supreme Judicial Court of Massachusetts, was presented by the Legislative Committee of the Massachusetts Bar Association and in a statement in support of the Act it was said:

"One object of this section is to assist the appellate Court by encouraging the practice of framing separate issues and taking special verdicts in cases where such course would enable the Court to correct errors of the trial Judge by dealing with the case as justice required upon the findings of the jury without sending the case back to be tried all over again simply because the general verdict was taken, when this whole expense

and delay of a second trial could have been avoided if the jury had been requested by the trial court to answer specific questions and decide separate issues. This section is not drawn in such a way as to make it obligatory upon the trial court, but it is to favor the practice of taking special verdicts in proper cases, which we believe to be an important and necessary step in any attempt to materially reduce delays and exceptions resulting from new trials."

The submission of the issues is in the discretion of the court but when submitted the findings are binding on the court. The practice of framing special questions, says the Chief Justice, is frequently used by the courts and the act is generally regarded with favor both by the bench and the bar in cases to which it is applicable and that in his opinion there is not much difference in the difficulties involved in the framing of issues and the practice under the general verdict system.

Michigan is considering the matter of amending its practice to provide for special verdicts, a movement doubtless encouraged by the very interesting articles of Professor Sunderland of the University of Michigan who has been an earnest advocate of the system since at least as far back as 1920.

In Minnesota while frequently used in equity cases it is not often used in suits at law. The statute seems to be favored by the judiciary but whether the practicing lawyers favors it depends entirely upon which side of the case he is on.

In Montana it is favored by the Appellate Court. In *Rairden vs. Hedrick*, 46 Mont. 510, that court said "the submission of special interrogatories to the jury is a matter addressed to the sound legal discretion of the trial court, and the observance of the practice, rather than constituting error is to be commended as tending to promote justice."

In Nebraska the statute is not very frequently used by the bar and "there is probably a feeling that the special findings may constitute a trap" and it is thought the proper framing of issues is more difficult than the proper framing of instructions for a general verdict.

New Hampshire, like Massachusetts, has no statute but the matter is also dealt with there as one of common law procedure. Trial judges there are said to be "pretty shy of such entanglements" but one in high position writes that in his opinion the practice of calling for a special verdict is a useful one and should be employed more than it is; that it often happens if the appellate court knew which of several grounds submitted was adopted by the jury a new trial would be obviated; that when there is error only as to issues which do not concern the conclusion reached by the jury, the verdict ought to be saved, which cannot be done where all are submitted for one general verdict.

The New Jersey Statute enacted in 1846 (Section 159 New Jersey Practice Act), is that "No jury in any case shall be compelled to give a general verdict but may find a special verdict and show the truth of the fact and require the aid of the court," a throw-back to the ancient fear of the attaint jury.

In New York the practice of taking a special verdict while reserving decision on motion to nonsuit the plaintiff is frequently adopted by members of the bench, the statute is favorably regarded and its application not regarded as unduly difficult.

In Ohio there seems to be a division of opinion

with the weight in favor of the system, but the framing of issues is regarded as very difficult.

Rhode Island reports that the special verdict furnishes a useful test by which to determine the validity of the general verdict.

South Dakota is getting hold of the right idea. There the statute is favorably regarded but not often used except in complicated cases and the suggestion is being discussed by some members of the bar that a law permitting juries to find all the facts without a general verdict, the court thereafter to apply the law, would be more likely to result in right disposition of the cases.

In Texas, Wisconsin and North Carolina special issues are used in one form or another under different names and with satisfaction and success, except perhaps in Texas where according to one critic the fault is not so much in the statute as in its administration. For a full discussion of the practice in those states I earnestly commend to those, if any there are, who may be interested in the subject, Professor Green's Article in *AMERICAN BAR ASSOCIATION JOURNAL*, December, 1927.

Chief Justice James W. McClendon of the Court of Civil Appeals, Third Supreme Judicial District of Texas, in writing of the practice under their statute says:

"My own views are that the special issue verdict is a great improvement over the general verdict. It has the following advantages:

"1. It enables the trial court to obtain a jury's findings on specific controlling issues of fact without confusing them with a statement of the law of the case, as is necessary in a general charge.

"2. In large measure it affects a jury finding on specific controlling facts uninfluenced by the effect of such findings upon the ultimate rights of the parties. It at least minimizes such influence as much as possible in a jury case.

"3. It obviates the necessity of reversals in many cases by having special findings for the guidance of the appellate court, even though the trial court may have erroneously construed the law of the case in some essential particular.

"4. It enables the trial court to submit independent theories of recovery or defenses which under the general verdict would have to be submitted in the alternative, and would require a reversal in case error was committed in any independent ground of recovery or of defense so submitted.

"5. It permits the finding on the facts of the case for the guidance of the appellate court in those cases in which the trial court may be of the opinion that the case should not be submitted to the jury, thus obviating the necessity of a new trial in case the appellate court should hold the case presented controlling fact issues.

"The main difficulty that I have observed in the administration of the statute is the fact that the bar and bench have been slow to recognize the essential differences between the special issue and general verdicts, and have in many instances applied to the former non-applicable rules attaching to the latter. This, however, I presume is incident to all radical changes in matters of practice which have to be dealt with by a large bar and bench."

Virginia has no statute and while the subject is casually discussed in that state there is yet no well defined movement to change their practice.

Washington approves; the statute is not infrequently used, most commonly in complicated cases, and it is thought the requiring of separate answers requires a more careful consideration of the evidence by the jury and the submission of the special issues places no special burden upon the trial judge.

West Virginia is now in the midst of a very serious consideration of this subject. In the *West Virginia Law Quarterly*, June, 1928, Robert T. Donley, of the West Virginia Bar, has a most interesting article on this subject and submits in practical and concrete form a bill designed to prescribe

the rules with reference to special verdicts, eliminating entirely the general verdict when special issues are submitted. This bill by Mr. Donley has been carefully reviewed and criticized and amendments suggested by Professor Leon Green, of Yale Law School, and while possibly not yet perfect in its form is certainly well worthy of the consideration of all who desire to improve our procedural system in civil jury trials. This proposal by Mr. Donley was recently submitted to the West Virginia State Bar Association for consideration and was referred to the Committee on Judicial Administration and Legal Reform. That Committee submitted a careful analysis of the proposed measure and recommended that the Executive Council take measures and provide time for its thorough discussion.

Now let us see how the statute works in North Carolina. *Buckner vs. Southern Railway Company*, et al, 194 N. C. 104, was a suit for damages for personal injuries with the defense of contributory negligence with a great deal of evidence as to how the accident occurred.

The issues and the answers of the jury were as follows:

1. Was the plaintiff injured by negligence of defendant as alleged in the complaint? Answer. Yes.

2. Did plaintiff by his own negligence contribute to his injury? Answer. Yes.

3. Notwithstanding the negligence of the plaintiff could the defendant have avoided the injury by the exercise of ordinary care? Yes.

4. What damages, if any, is plaintiff entitled to recover? Answer. \$5,500.00.

It can readily be seen that the instructions for a proper understanding of the case by the jury could be exceedingly simple.

Now let us see what we did under our practice here in Maryland in the case of *Payne, Director-General of Railroads, vs. Healey*, 139 Md. 86. This was an action for damages for personal injuries and for damages to plaintiff's automobile. Plaintiff in his automobile "was picked" up at Antietam Street crossing of the Cumberland Valley R. R. in Hagerstown and carried along on the side of the engine some 300 feet down the track to where the automobile was wiped off by a semaphore, the plaintiff having jumped just before the semaphore was reached.

To clarify the situation for the jury these prayers were granted by the trial court and approved by the Courts of Appeals. They are familiar words to you, but please listen to them, not as lawyers, but from the standpoint, if you can, of the average juror. I hesitate to read them at length but it seems necessary to emphasize the points

**Plaintiff's 1st Prayer.**—The jury is instructed that if they find from the evidence that the engine and train of the defendant collided with the automobile of the plaintiff while the plaintiff was in said automobile at the Antietam Street crossing and that said engine and train carried said automobile with the plaintiff therein along the tracks of the defendant, if the jury so find, and further find that said automobile was carried to the semaphore south of said crossing and the plaintiff to a point a short distance north of said semaphore, if the jury so find, and further find that said automobile was broken up and destroyed by coming in contact with said semaphore and that the plaintiff was injured by jumping from said automobile at said point north of said semaphore, if the jury so find, and further find the plaintiff was in a position of peril in relation to said engine while he was still upon the Antietam Street crossing, and further find that the engineer in charge

of said locomotive could by the exercise of reasonable care for the safety of persons on said crossing have known of said position of peril while the plaintiff was still on said crossing in such time that the engineer could by the exercise of reasonable care and caution have stopped said engine and train and avoided injury to the plaintiff or his automobile before it reached said semaphore and before the plaintiff jumped from said automobile, if the jury so find, and further find that the damages to said automobile were not caused until it came in contact with said semaphore and that the personal injuries to the plaintiff did not occur until he jumped from said automobile, as aforesaid, if the jury so find, then their verdict must be for the plaintiff; provided the jury shall further find that after said collision on Antietam Street, if the jury so find, the plaintiff was in the exercise of reasonable care and caution.

**Plaintiff's 3rd Prayer.**—Measure of damages in usual form.

The defendant offered 12 prayers, of which the following were granted and approved by the Court of Appeals:

**Defendant's 6th Prayer.**—The defendant prays the Court to instruct the jury that under the pleadings there is no evidence in this case legally sufficient to enable them to find any negligence on the part of the defendant his agents or employees in respect to the headlights of the locomotives, which the jury may find were in the vicinity of the place where the accident complained of occurred, at the time thereof, either in reference to the number of kind thereof, or in reference to the manner or way the said headlights were burning.

**Defendant's 7th Prayer (as modified by lower Court).**—The defendant prays the Court to instruct the jury that if they find from the evidence that the plaintiff was guilty of any negligence which in any degree directly contributed to the injuries complained of, he is not entitled to recover, and their verdict should be for the defendant, but the jury are further instructed that in determining whether any negligence of the plaintiff directly contributed to the injuries complained of, they are not to consider any negligence of the plaintiff directly contributing to the original collision of the locomotive and automobile, provided the jury further find the facts set out in plaintiff's first prayer.

**Defendant's 8th Prayer—Granted.**—The defendant prays the Court to instruct the jury that from the plaintiff's own testimony he was guilty of negligence directly contributing to the collision between the engine of the defendant and the automobile of the plaintiff, and that under the pleadings in this case the plaintiff cannot recover unless they shall find from the evidence that the engineer in charge of the engine of the defendant was guilty of some specific act or acts of negligence after he became aware or by the exercise of reasonable care could have become aware of the peril in which the plaintiff by his said negligence had placed himself, which caused the injuries complained of, and to further instruct the jury, that the burden of proof is upon the plaintiff to establish that the said engineer was guilty of such negligent act or acts.

**Defendant's 9th Prayer—Granted (as modified).**—The defendant prays the Court to instruct the jury that it was the duty of the plaintiff to look and listen for approaching trains, as he approached the tracks of the defendant on the occasion of the injuries complained of and to continue to look and listen until the said tracks were reached and to further instruct the jury that if they shall find from the evidence that the view of the plaintiff of said tracks, as he then and there approached the same, was in either direction in any way obstructed, then it was the duty of the plaintiff to stop, look and listen for the approaching train or trains before attempting to cross the said tracks; and to further instruct the jury that if they shall further find that the plaintiff did not so look and listen, or did not stop, look and listen, if they shall find that the view of the plaintiff of said tracks was in either direction obstructed and shall further find that his failure to so look and listen or to so stop, look and listen, directly contributed to the collision between the engine of the defendant and the automobile which the plaintiff was then and there driving, then the plaintiff is not entitled to recover, unless the jury shall further find from the evidence that the defendant, its agents or employees, in charge of the engine and train which collided with the automobile of the plaintiff could have by the exercise of reasonable care and caution on his or their part, after he or they or any of them became aware of the peril, the plaintiff had by his negligence, if the jury shall so find, placed himself, avoided the consequences of the plaintiff's said negligence and prevented the injuries complained of or unless they further find that the engineer in charge of said engine could by the exercise of reasonable care have discovered the position or peril of the plaintiff while the plaintiff

was upon the Antietam Street crossing and that the said engineer could by the exercise of reasonable care have avoided injury to the plaintiff or his property after he ought to have discovered the peril of the plaintiff if the jury so find.

Thus was the situation clarified for the jury and very correctly was it done under our system.

Notwithstanding all this legal verbiage the issues were very simple. If we followed here the practice of submitting the issues to the jury they might have been in substance as follows:

1. Did or, by the exercise of reasonable and ordinary care in their work, could any of the railroad employees see Mr. Healey's dangerous position after the collision at Antietam Street crossing and before the injury, in time to prevent the same by the exercise of reasonable ordinary care.

(a) To Mr. Healey's person? (Answer Yes or No.)

(b) To his automobile? (Answer Yes or No.)

2. If on your finding of the facts the Court should hold the defendant railroad liable at what do you assess the damages?

(a) To the person?

(b) To the automobile?

These issues could have been accompanied by two or three simple instructions, one as to the measure of damages, one as to the burden of proof, and possibly one defining reasonable care.

It is respectfully submitted for your consideration which method would be more easily understood by the jury and which would be more likely to contain errors for review by the Court of Appeals. In the particular case the verdict naturally was against the railroad company and under the facts no doubt properly so, but will it be contended by anyone that the voluminous instructions to the jury enables the jury to understand more clearly what they were to decide?

The North Carolina Reports have many illustrations of their practice and the form of issues in negligence cases has become almost standardized. That standardization is illustrated by the issues in the case of Ledford vs. Tallassee Power Company and Conner and Starks and Dereberry, 194 N. C. 98.

Waller vs. Dudley, Jr., 194 N. C. 139, was an action of trespass q. c. f. The issues and answers were as follows:

1. Did the defendant trespass upon the land of plaintiff and cut and remove therefrom cord wood and timber trees as alleged? Yes.

2. If so, what damages, if any, are plaintiffs entitled to recover? \$450.00.

Town of Dillsboro vs. Dills, et al, 194 N. C. 185, was an action by the plaintiff against the widow and heirs of W. A. Dills to restrain them from trespassing on certain lands in the town of Dillsboro. Plaintiff claimed the land had been dedicated to it by Dills, and that it had been in adverse possession since 1845, some 41 years, both of which were denied. The issues and answers were as follows:

1. Did W. A. Dills dedicate to the town of Dillsboro the lot of land described in the bill of complaint? No.

2. Has the plaintiff town been in open, notorious, continuous and adverse possession for 20 years of the lot of land described in the complaint? No.

3. Are the defendants in the unlawful, wrongful possession of the lot of land described in the complaint? (No answer.)

4. What damages, if any, is the plaintiff entitled to recover? (No answer.)

It is obvious that no answers were required to the 3rd and 4th issues because of the answers to the first and second.

In Wisconsin the general practice is to submit many more issues than in North Carolina. This is done by splitting the main issues. It is generally believed this should be avoided as much as possible. For the practice in an action of ejectment in Wisconsin see *Litel vs. First National Bank of Oregon*, 196 Wis. 625.

Now let us turn to Ireland.

*Butterly vs. Mayor of Drogheda*, 1907, 2 Irish Reports, 134-137, was an action for damages for personal injuries growing out of the attempt of one traveller on a public highway to pass another where there were heaps of repair stone along the road, which caused the plaintiff's vehicle to overturn.

Three questions were left to the jury:

1. Were the defendants by their workmen guilty of negligence? Yes.

2. Was the plaintiff guilty of negligence? Yes, and if so:

3. Could the plaintiff by the exercise of ordinary care have avoided the consequence of the defendant's negligence? Yes.

The appellate Court said that the issues should have been only these two:

1. Were the defendants guilty of negligence? and if so:

2. Was the defendants' negligence the real direct and immediate cause of the misfortune?

The result, however, the Court held, was the same and the finding of the jury for the defendant on the ground of contributory negligence was correct.

Under the English practice it is said that while special interrogatories under restrictions may be submitted, the jury may decline to answer them and give a general verdict. *Wurtz. The Jameston Trial*, 6 Y. L. J. 32.

One of the objections that has been urged to the special verdict is that under the loose form of pleadings in use in many of the states there is a great difficulty in submitting to the jury proper issues of fact. It has also been suggested that if we are more careful with our pleadings so that issues are properly presented by the declaration and pleas and subsequent pleadings the issues may be concretely stated. The abolition of the general issue plea or at least the narrowing of its scope so as to compel the defendant to disclose to the plaintiff at least as much as the plaintiff is required to disclose to the defendant has been seriously discussed and considered by some of the members of this association. If the adoption of a proper and well considered special verdict statute has an indirect result the improvement of our pleadings so that the issues between the parties are more clearly set out in the pleadings themselves, as has been suggested by Professor Sunderland, then that alone will be worthy of accomplishment.

If the pleadings are sufficiently clear and the general issue plea abolished so that the real issues appear on their face there would be no great difficulty in framing the issues before the jury is sworn as was suggested by the Court of Appeals in *Central Construction Co. vs. Harrison*, 137 Md. 265,

heretofore mentioned in connection with the practice in appeals from the State Accident Commission, and as is done in issues from the Orphans' Court and Courts of Equity. It is true that we should go slowly in making any radical change in our procedural methods. It is true that it will take time to make such changes and it should take time. It took years to get the Act of 1927, which gives to the Court of Appeals the right to make rules of procedure on the law side. We have the Act and in due time we will have the rules.

Professor Green<sup>1</sup> is firmly of the opinion that the special verdict *in lieu* of the general verdict

should be used instead of the special verdict or special interrogatories *in aid* of the general verdict and it does seem that if the Court has the power and should have the power to set aside the general verdict where the special verdict or the answers to the special interrogatories are inconsistent with the general verdict, there is no necessity for the general verdict at all and the jury should not be burdened with any application of the law but that application should be left to the Court alone where it properly belongs.

1. Professor Green's article on "A New Development in Jury Trial," in the December, 1926, issue of the AMERICAN BAR ASSOCIATION JOURNAL is here referred to.

## RESTATEMENT OF THE LAW OF PROPERTY

BY RICHARD R. POWELL

*Reporter on Subject for American Law Institute*

S LIGHTLY more than three years ago, the American Law Institute requested Prof. Harry A. Bigelow of the University of Chicago Law School to make a preliminary report upon the feasibility of making a Restatement of the Law of Property. This report was presented to the Institute in November, 1926. It showed that a very large percentage of the problems actively engaging the attention of the profession is comprehended within the topics commonly regarded as constituting the law of property; that these topics are of very unequal importance to the profession and that any Restatement undertaken would, of necessity, select the topics to be restated in an order determined by pragmatic considerations, rather than by dictates of logical succession. Upon this background the Institute began its work with Professor Bigelow acting as Reporter.

The Reporter was particularly fortunate in the persons whom he was able to secure as his Advisers. They consisted both of teachers in the leading law schools of the country, like Aigler of Michigan, Bogert of Chicago, Clark of Yale, Fraser of Minnesota, Powell of Columbia, Rundell of Wisconsin and Warren of Harvard, and also of gentlemen who had attained distinction in the active work of the profession, like Henry Upson Sims of Birmingham, Alabama, and Charles A. White of Cleveland, Ohio.

The Reporter and this group decided that the most important first step in any work in the field of property would be the attainment of a common parlance of precision with which the ideas found in the American law of property could be expressed with definiteness and accuracy and in a fashion certain to be understood by the profession with the same connotations as the language bore to those who wrote it for the Institute. Persons familiar only with the ordinary exchanges of ideas between intelligent people, have little realization of the extreme difficulty of so framing a sentence that it expresses exactly what is in the thinker's mind, and

the equal difficulty of being sure that the language used will have the same meaning and connotations to his reader as it had to the thinker. It was felt that the terminology of "right, power, privilege and immunity" would be one useful tool in the attainment of the desired precision. Other terms used with frequency in the law of property have been defined tentatively.

Thus the earlier sections of the material prepared by the Property group consist of definitive material, designed to enable the group to use labels for definite things and to use words in one sense and one sense only. It cannot be overemphasized, however, that these preliminary definitions of concepts are only tentatively adopted. There is no intention in the property group to use these definitions as a Procrustean bed to which subsequent parts of the Restatement are to be warped. In their present form they represent the best tentative form which the Reporter and his Advisers have been able to draft. If, however, in the course of subsequent work in the Restatement, it is found that modifications of these preliminary matters will facilitate the task as a whole, such changes can then be made.

After completing this introductory work, the Property group began the Restatement of the law of possessory estates in real property. This was felt to be an important branch of the law, and one in which the technique peculiar to the restatement of property law could be evolved and tested. It was obvious also that this work would be a rather necessary preliminary to the Restatement of the law of future interests in which the Institute feels it can render a service of first importance to the profession. The treatment of each of the various types of possessory estates has been divided into two parts, called for convenience, "Form of Limitation" and "Constituent Characteristics." Thus the Restatement deals first with the sorts of transactions that give rise to each specific type of estate

and then treats the characteristics of the resultant interest.

At the last annual meeting of the Institute held in Washington, D. C., in April, 1929, the Introductory Chapters and parts of the Chapters dealing with Estates in Fee Simple and Estates in Fee tail were presented to a very large and representative group of the leaders of the bar. The material was received very favorably and it was generally felt that Professor Bigelow had made a most promising beginning on an extremely difficult task.

The experience of the past two years in the work on the law of property has convinced the group of certain matters that vitally affect the future of this Restatement project.

In the first place, cases dealing with property law abound in generalities which, when applied to a given set of facts, call for opposing conclusions. Both generalizations are *usually* correct but are, to some extent, inaccurate. It is a field in which any restatement that is to be genuinely helpful to the profession must particularize extensively. Some corollaries of this fact are self-evident. Any group attempting to particularize extensively will cover an extremely limited area of the law in any given period of time. This has the disadvantage of restricting the immediate aid rendered by the Institute to quite narrow fields in the Law of Property. It has the quite overwhelming advantage, however, of making it highly probable that the products of the Institute will be actually helpful to the judiciary and the practitioner as and when produced. The slowness of production can be speeded by the cooperation of two or more groups simultaneously operating in different fields of the law of property. Extensive particularization has one other danger which must be avoided. By particularization one may crystalize an undesirable rule so as to hinder further moulding of a rule to meet changing conditions. Of this danger the Property group are keenly aware and they are seeking to avoid the danger by emphasizing in the form of notes as to construction problems and as to the factors significant in observable bits of evolution, the directions and forces to be observed in continuing the evolutionary processes so universally operative in our present day law. It is their hope that their work will make the profession more aware of the forces at work for the evolution of our law, rather than tend to retard this change by arrested fixations of the law.

In the second place, almost no aspect of the law of property exists as to which statutes do not play an important role. Concerning some matters, most states have like statutes. Concerning other matters, the states fall into well defined groups so that there are several states having each type of statute. In either of these cases, no realistic restatement of the law of property can be made without taking into account the statutes on the topic. This necessity for studying statutes and for recognizing their significance in the task of restatement, adds to the difficulty but adds also to the utility of the task.

During the summer of 1929, Professor Bigelow accepted the Deanship of the University of Chicago Law School and requested the Institute to relieve him of his task as Reporter. For some eighteen months prior to this time, the writer had

been working in the closest cooperation with Professor Bigelow as a "Special Reporter on Selected Topics." The Institute requested the writer to take over the task as Reporter and the offer was accepted.

Too little time has since elapsed for much to occur worthy of record herein. The present Reporter feels that he has a most excellent foundation upon which to build, both in the work already done and in the group of advisers assembled, and in the confidence of the profession that has been deservedly earned for this project by the labors of Professor Bigelow. At the next meeting of the Institute in May, 1930, all of the material dealing with possessory estates in real property will be presented for consideration. Beginning about the first of the year the group will undertake the restatement of the law of future interests and therein both real and personal property will be considered.

Before concluding this brief account of this one branch of the activity of the American Law Institute, an emphatic tribute to the men who have been acting as Advisers must be written. The writer has never had the privilege of working with a group who were simultaneously so friendly, so anxious to help and so keenly critical. The product of the Institute in the law of property has not been, and will not be, the product of any one man or of the men who hold the title of Reporter. It is a product of interplaying minds bringing together a wealth of learning, an abundance of hard work, and years of practical experience at the bar. This fact minimizes the significance that might otherwise attach to the change in reportership in this Topic.

#### Journal of Air Law

THE Institute of Air Law at Northwestern University has just published the first number of the "Journal of Air Law," in collaboration with the University of Southern California and Washington University School of Law at St. Louis. It has a joint editorial board, with representatives of the three Universities, together with a larger board of contributing editors made up of the members of the Advisory Board of the Air Law Institute.

The "Journal of Air Law" will be published quarterly, in the months of January, April, July and October, and will contain leading articles, editorials, documents, case comments, book reviews and a digest of leading articles dealing with the subject of air law. It will cover phases of aeronautical law, air property law and radio law.

The leading articles in the first issue are as follows: Germany and the International Flight Convention of 1919 by Dr. Albert Wegerdt, German Minister at Berlin; second, Carriage of Passengers by Air, by E. A. Harriman of Washington, D. C.; Public Utility Air Rights by Theodore Schmidt of Chicago; and The Certificate of Convenience and Necessity Applied to Air Transportation, by Thomas Hart Kennedy. There are also included several important documents and digests of the leading foreign articles.

The editorial board is composed of Professor Fagg, who is the Director of the Air Law Institute, Professor Robert Kingsley of the University of Southern California, who is also the editor-in-chief of the Southern California Law Review, and Professor George B. Logan of Washington University at St. Louis.

# THE RULE-MAKING POWER: A BIBLIOGRAPHY

THE JOURNAL is frequently requested to furnish references to articles on the Rule-Making Power and other subjects closely connected with current efforts to improve the administration of justice or with the development of law in special fields. This fact has suggested that the publication from time to time of bibliographies on these subjects might be of special interest to many members of the profession and also furnish aid to the general forward movement. We are printing in this issue a bibliography on the Rule-Making Power, which is doubtless incomplete, but gives all the information which we could find upon the subject.


Our limited facilities do not permit us to attempt to secure copies of the magazines containing any of these articles for readers who may be interested, with, of course, the exception of copies of the American Bar Association Journal. Those interested are requested to write directly to the publication in question, if the material is not available in any local library. At the end of the bibliography will be found the addresses of the various magazines and institutions mentioned therein.

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 California Judicial Council, Supreme Court, Sacramento, Calif.  
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#### Rare Old German Law Volumes Acquired by Law School

THE library of Von Richthofen, a German scholar who died in 1888, containing 4,250 volumes, has been purchased by Columbia University School of Law, it is announced. The collection is considered one of the most valuable records of the law as it existed in various cities and towns in Germany during medieval times. It includes a history of the laws of the Frisians, a Teutonic people inhabiting the region about the North Sea adjoining the Saxons who conquered England; rare items dealing with the customary laws of towns and cities in the Netherlands and Northern Germany; old grammars, dictionaries and glossaries; scientific treatises on European local law, and important genealogies.

One of the great untold tales of the law, declared Professor Julius Goebel, Jr., of the Columbia University Law Library Committee, in announcing the purchase, is the influence which medieval laws had upon the common law which supplanted them.



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The above picture is of the clothed skeleton of Jeremy Bentham, Philosopher, Lawyer and Reformer. It certainly deserves to rank as one of the curiosities of the age. The story of it, which is perhaps not generally known, is as follows: For the advancement of science Bentham directed that his body should be dissected and this injunction was obeyed. The skeleton has been carefully preserved in the Anatomical Museum of University College, London. It is seated in his chair, covered with the clothes he commonly wore, and supporting a waxen effigy of his head. Across one knee rests his favorite stick, "Dapple," and at the foot of the figure lies the skull, with the white hairs of the old man still clinging to its surice. These facts come from Atkinson, "Jeremy Bentham," p. 208; and Davidson, "Political Thought from Bentham to J. S. Mill," p. 44.

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### Letters of Interest to the Profession

#### The Association and Uniform Legislation

Editor AMERICAN BAR ASSOCIATION JOURNAL:

Some members of the A. B. A. would find no pride nor satisfaction should the Association develop into a super-lobbyist with power to push through forty-eight legislatures and the Congress such measures as in its wisdom it considers advantageous to the interests which it represents. There is a limit to the usefulness to the citizenry at large of uniform legislation. It appears that the Association does not fully comprehend that limit. A case in point is the uniform public utilities act. Its genesis indicates that the measure was not intended to benefit the public or the class of unorganized and inarticulate consumers but rather to extend and to buttress the privileges of public utility owners, except bankers, probably the best organized and most influential group in the United States. They are fully able to roast their own chestnuts. Proper policy and practice in dealing with utilities is filled with question marks for any person who views the problem from the public standpoint. It is an ill service to close up the 48 laboratories dealing with this problem and to impose upon the states a ready-made policy of utility-owner pattern.

Members of the association may congratulate themselves heartily that it was not placed in a similar position with regard to the proposed bank collection code launched by the American Bankers Association and eulogized in the September number of the JOURNAL by Thomas B. Patton, Jr. It goes without saying that the depositor ought to be responsible for the items for which he asks credit so far as concerns his own good faith, integrity and responsibility, and that of the maker, if he be other than the depositor. To make him insurer of the insolvency of the

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banks involved, or to assume the risks of unfaithful or negligent agents he has no hand in selecting is so at variance with equity and sound public policy that no group short of the powerful banker group could secure it favorable consideration.

Enlightened governmental policy is in the direction of safeguarding the unorganized masses from imposition on the part of organized groups, whether within the government or outside of it. Every man in active industrial life today must use the bank. It is our most important public utility. Loss of an item in an account may be disastrous to the individual, spelling the difference between solvency and insolvency, competency and want. Banks have means of insuring themselves against such losses and promptly shifting the burden to industry in general. They should continue to do so, and not put the burden upon the individual who has no such ability. Banks ought still to be responsible for the default of their collection agencies, and for receiving payments in other than currency. No fault need be found with the provision to make collection items preferred claims against the assets of an insolvent bank, when not intended as a credit.

The American Bar Association ought to stand prepared to give the benefit of expert advice and information to government agencies when asked by responsible government officers. Except where its own interests or the interests of its members are directly involved, it ought to shun lobbying or the promotion of legislation as an association. Government by powerful organizations legislatively irresponsible is an intolerable abuse. The American Bar Association ought to put this subject upon the agenda of an annual meeting and seriously consider whether it is not sound policy to call a halt at once upon this line of its activity.

Washington, D. C.

J. W. BENNETT.

## An Immediate Remedy Demanded

Editor, AMERICAN BAR ASSOCIATION JOURNAL:

The condition of semi-chaos of the business in certain of the Courts of the country arising from the multitude of cases growing out of the Prohibition laws certainly demands some immediate remedy. That remedy can most sanely come from the American Bar Association. Whatever view one takes of the wisdom or unwisdom of prohibition, sane people everywhere are coming to recognize that conditions under existing law are rapidly becoming intolerable. The time is fast approaching when something constructive must be done to remedy this situation. Politicians cannot do it for lack of courage and self interest; fanatics on either side of the question cannot do it because of the one-sidedness of their views. The American Bar Association certainly could take the lead in advocating some sane course, which would improve conditions in the Courts, and bring to an end the period of lawlessness which is now invading practically every section of our country.

People generally have great respect for the American Bar Association. Any remedy it proposes will instantly command the attention and the serious consideration of thinking people everywhere. Would it not be well for the Association to make a careful study of this matter through one of its existing committees or a Special Committee appointed for the purpose. In this way definite plans for improvement of existing law could be brought before the whole Association, and when finally approved by it, could afford a sensible course for the nation to follow.

Sooner or later something must be done to correct existing evils, and certainly the American Bar Association can best show the way in so far as business in the Courts is concerned.

FREDERICK S. TYLER.

Washington, D. C., January 2, 1930.

## NEWS OF STATE AND LOCAL BAR ASSOCIATIONS

### Idaho



HON. JESS HAWLEY

President of the Commissioners of the Idaho State Bar

#### Report of the Idaho State Bar for 1929

Just and serious criticism, by prominent attorneys and laymen, of the practice of law and the practices of lawyers

created a determined effort to bring the profession to the place in the confidence of the people and value to the state that it should occupy.

Nothing could be done without an organization of attorneys—and very little so long as that was voluntary, because many lawyers held the view that the practice of law was a business, and their own business, and not a privilege granted by the State with implied obligations of service to the interest of Government; that the individual owed no serious or important duty to his profession, and his own practice was his own affair. Only compulsory membership in an organization entrusted by the State with concerns of the profession could force the lawyers themselves to recognize the duty and responsibilities impressed by acceptance of a license fee to practice law.

The result was a bitter fight in 1923 over passage of the law organizing the Idaho State Bar. This fight was successful and the law was passed against the votes and opposition of practically all of the lawyers then in the Legislature. The Act was not accepted as wise and fair by the lawyers of the State and was attacked several times in the Supreme Court—in fact, it barely got recognition by that Tribunal in a three to two decision, and the majority opinion ripped and tore the Act almost to uselessness. The Commissioners were chiefly concerned with preservation of the Act. Its merits were slowly and grudgingly acknowledged.

Legislative amendments in 1925 and 1929 strengthened it. It grew in the favor and confidence of the Supreme Court, the people and the Bar, and we

can now say that very little opposition exists.

In 1929 the Legislature added importance and recognition in an amendment which is quoted because of the value it has as suggesting to other Bar Organizations possibilities not ordinarily contained in Bar Acts:

"16-A. The Governor, Supreme Court, or the Legislature of the State of Idaho, may request of the Board an investigation and study of and recommendations upon any matter relating to the Courts of this State, practice and procedure therein, practice of the law, and the administration of justice in Idaho, and thereupon it shall be the duty of said Board to cause such investigation and study to be made, reported to an annual meeting of the Idaho State Bar, and, after the action of said meeting thereon, to report the same to the officer or body making the request. The Board may, without such request, cause an investigation and study upon the same subject matters, and after a report thereon to an annual meeting of the Idaho State Bar, report the same and the action of said meeting thereon to the Governor, Supreme Court, or the Legislature of the State of Idaho."

"16-B. The Idaho State Bar and its Board of Commissioners shall have the power and authority to aid in the advancement of the science of jurisprudence and in the improvement of the administration of justice."

The annual meeting of the Idaho State Bar was held in Idaho Falls, Idaho, in August, 1929. The amendments just quoted were decided as sufficient authority for the establishment of a Judicial Council. Accordingly, the Bar Commissioners were authorized to ap-

When

People's Questions

Press

the note was not paid

Ordered three carloads ~

Representatives of a deceased grandchild claim a share

Both automobiles were going in the same direction

Is the title marketable?

Payment was duly made

Says that suit is barred by limitations ~

Not up to the sample

Contributory negligence ~

The Survivor to take the whole ~



Turn to  
**RULING CASE LAW,**

point five Judges and five Attorneys, and the result was the following personnel of the Judicial Council:

Hon. Alfred Budge, Chief Justice Supreme Court, Boise; Hon. Wm. E. Lee, Justice of Supreme Court, Boise; Hon. Wm. F. McNaughton, District Judge, Couer d'Alene; Hon. Ralph Adair, District Judge, Blackfoot; Hon. Dana E. Brinck, District Judge, Boise; James Harris, Attorney, Weiser; A. L. Merrill, Attorney, Pocatello; Eugene A. Cox, Attorney, Lewiston; James Bothwell, Attorney, Twin Falls; Frank Martin, Attorney, Boise.

By reason of the appointment of Judge Wm. E. Lee on the Interstate Commerce Commission a vacancy on the Council has been created.

The funds necessary for the work of the Council were appropriated from the fund created by the \$5 license fees required to be paid into the State Treasury by each practicing attorney of the State.

The Judicial Council met November 21, 1929, at Boise. All the members were present, and Chief Justice Alfred Budge was elected as President, and Hon. Frank Martin as Secretary. This Council is to report in time for the summer annual meeting of the Bar. Its work consists of an exhaustive study of the judicial system of Idaho to the end that anachronisms and inefficiencies be discovered and reported, and the judicial procedure of Idaho brought to date. The work of the Commission also will take in a study and report on the adoption of new features in both civil and criminal practice, among these being the right of the state to comment on the failure of the defendant to testify; less than unanimous verdicts in criminal cases; right of a judge to comment on testimony; right of the Courts to make rules, removing that power from the Legislature.

The press of Idaho has commented very favorably upon the personnel and purpose of the Judicial Council Committee of the Idaho State Bar. The Idaho Falls meeting of the Bar requested the Bar Commissioners strenuously to contest the right of trust companies to draw wills, trust instruments, and in other ways practice law. A test case has been filed citing a Trust Company and its President to show cause why they should not be punished for contempt of court for practicing law and holding themselves out as so capable, without a license.

The program presented at the Idaho Falls meeting was well received. It consisted of an address on "Judicial Council and Rule Making Power" by Hon. Raymond L. Givens, Associate Justice of the Idaho Supreme Court. This address directed the attention of the organization to the need of a Judicial Council, and largely as a result the Bar took action in the organization of a Judicial Council as before indicated.

Hon. Alfred Budge, Chief Justice of the Supreme Court of Idaho spoke on "Unification of Courts as Applied to Idaho." This address was particularly well received.

Hon. Jess Hawley gave an address on the new Idaho business Corporation Code. This Code was formed largely on the Uniform Business Corporation Act drafted by the Commissioners on Uniform State Laws.

A very practical address was delivered

by Hon. Jesse R. S. Budge of Salt Lake City, Utah, on "Should Probate Jurisdiction be in the District Court?"

Hon. F. S. Dietrich, Judge of the United States Circuit Court of Appeals for the Ninth Circuit, gave a profound and interesting address under the subject "Causes for Disrespect for Law."

JESS HAWLEY,  
Pres. Board of Commissioners, Idaho  
State Bar

## New York



HON. FRANK H. HISCOCK  
President of N. Y. State Bar Association

### New York State Bar Association's Annual Meeting

Frank H. Hiscock of Syracuse, former chief judge of the New York State Court of Appeals, was reelected president of the New York State Bar Association at the annual meeting January 17 and 18 in New York City. The meeting and the annual dinner showed the largest attendance in the history of the Association. Charles W. Walton and Harry M. Ingram, both of Albany, were elected secretary and treasurer respectively.

The speakers included Governor Franklin D. Roosevelt, Cuthbert W. Pound, associate judge of the New York State Court of Appeals; John W. Davis, Colonel William J. Donovan, Frederick E. Crane, associate judge of the New York State Court of Appeals; Frank H. Hiscock, William M. Clark, Rollin B. Sanford, member of the New York State Board of Law Examiners; Senator Caleb H. Baumes, chairman of the legislative Crime Commission.

Judge Hiscock in his review of the association for the year of 1929 stressed the unprecedented increase in membership and reported progress on the more pressing problems of the bar.

Adoption of a report on personal injury litigation was a feature of the 1930 meeting. The report was submitted by the Committee on Litigation Affecting Personal Injury, of which Robert H. Jackson of Jamestown is chairman. Personal injury litigation last year became foremost in matters of importance before the Bar of New York State. Leg-

islation was introduced to control the so-called "ambulance chasing" by law but it failed of passage.

The report of Mr. Jackson's committee removes the problem from the state lawmaking bodies and places it with the Appellate Divisions in the various departments. In part it says: "The larger Bars should appreciate that many who oppose general legislation do so because in their background of experience there is not such manifest abuse as to justify legislation restrictive of their freedom. The smaller Bars should appreciate that the problem of the larger city typified by the New York City situation, cannot be quarantined, that it threatens to spread throughout the whole State."

The committee recommended as follows: "That the profession itself make a sustained and well considered use of the inquisitorial and rulemaking power of the Appellate Division of the Supreme Court to correct professional derelictions and abuses; that all of the Appellate Divisions consider the desirability of annually designating a Justice of the Supreme Court in each department before whom complaints involving these abuses may be presented and heard."

The report then takes up the claim adjusters side as follows: "Since the claim agents and adjusters of defending insurance or utility corporations are generally laymen, not amenable to the discipline of the profession or the rule making power of the courts, we recommend that legislation be favored imposing counterbalancing restraints upon their abuses and activities."

Another report which was widely discussed at the annual meeting came from the Committee on the Organization of the Bar and Cooperation between State and Local Bar Associations. A minority report was made by William D. Guthrie and Allan McCulloch, while the main report, which was adopted, was submitted by George H. Bond, chairman of the committee. The majority report favored establishment of federated bars in the judicial districts of the State.

Action on a report from the Committee on Public Defenders recommending establishment of such officers was deferred until the next annual meeting.

CHARLES W. WALTON,  
Secretary

## Ohio

### Ohio State Bar Has Significant Mid-Winter Meeting

The Mid-Winter Meeting of the Ohio State Bar Association, held at Dayton Jan. 23-24-25, witnessed the largest out-of-town registration in the history of the Association. An interesting program was carried out and a number of important decisions were made.

The State Bar's continuous interest in codification of various branches was evidenced by the reports of a number of committees. Judge Thomas H. Darby, of Cincinnati, Chairman of the Committee on the Criminal Code, stated that the work of the original committee had been practically completed with the adoption by the last legislature of the new Criminal Code. The committee had been enlarged to twenty members and they were very anxious to have criticisms and suggestions from judges and lawyers with reference to this code.

Chairman George W. Ritter of Toledo presented the report of the Committee on a Municipal Code, outlining its work to date and urging representatives of cities, towns and villages which do not have a charter form of government to submit their difficulties and suggestions. Chairman Wilbur E. Benoy outlined the activities of the Committee on an Insurance Code and announced that this body would have a proposed code ready for presentation to the annual meeting in July.

The report of the Probate Code Revision Committee was presented by Chairman Howard L. Barkdull of Cleveland. He outlined the work of the committee, particularly in the regional meetings, and stated that the actual work of drafting the proposed amendments in statutory form had been assigned to Mr. Edward D. Howard of Columbus, the result of whose work would be submitted to the annual meeting in July. The report contained a number of rec-

ommendations, which were discussed by the chairman, among them proposals for an amendment of the statutes of descent and distribution; for creation of a legal presumption that husband and wife died in the order of seniority, the younger surviving; that in descent and distribution the distinction between real and personal property be abolished, and on real property, the difference between ancestral and non-ancestral property; that the dower of the surviving spouse be increased; that the present provisions with reference to inchoate dower and the necessity for signature on deed be continued, although in the opinion of the committee it should be abolished. These and other recommendations of the committee were discussed with interest by the members, particularly the one dealing with inchoate dower.

The subject of "The Practice of Law"—what constitutes the practice and violations of the right of the profession to have the practice confined to those leg-

ally qualified—was also in the forefront of matters considered at this meeting. The report of the Committee on Professional Ethics, of which Past President John A. Cline of Cleveland is chairman, stated that the Supreme Court had adopted eight of the nine proposed new rules governing the conduct of attorneys, but had not defined the practice of law or adopted the proposed rule providing for the discipline of lawyers in the employ of corporations which practiced law. On recommendation of the committee, the amendments to the Canons of Ethics adopted by the American Bar Association in 1928 were adopted by the association; a resolution was passed that local bar associations institute proceedings to discipline offending members for practices condemned by the Supreme Court, and also take proceedings not only against lawyers but also against corporations which practice law; and another resolution was passed that the Attorney General of Ohio be requested to begin quo warranto proceedings against corporations now or hereafter engaged in the practice of law. Another committee, that on Grievances, reported that it was giving careful attention to the practice of law by corporations and requested that the Executive Committee be authorized to appropriate the necessary funds for the investigation. The request was granted.

The report of all the other committees, as well as the proceedings at the joint luncheon of committees on Thursday, at the Conference of Bar Association Delegates, and at the meeting of the Judicial Section bore witness to real activity and a genuine constructive spirit in the organization.

The meeting was called to order Thursday morning by President William G. Pickrel, and prayer was offered by Rev. Hugh I. Evans. Addresses of welcome were made by Hon. Allen C. McDonald, mayor of Dayton, and Hon. Orin Britt Brown, Past President of the Dayton Bar Association. Response on behalf of the State organization was made by Hon. Walter G. Kirkbride, of Toledo, member of the Executive Committee. President Pickrel's address Thursday afternoon revealed that the Association, despite its increased activities, is living within its income. He dwelt on the efficient work of the various committees and the success of the regional meetings. He recommended that the question of an all-inclusive State Bar be given careful thought and attention, and that the Association-at-large elect a Vice-President, who could receive training to fill the highest office in the Association. At a later session Hon. John A. Elden of Cleveland, chairman of the All-Inclusive Bar Committee, took up the President's suggestion on this subject, discussed the situation with reference to this form of organization in various states, and moved that the Association

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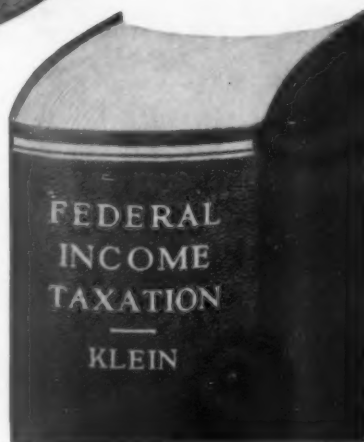
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go on record as favoring an all-inclusive, self-governing bar organization for Ohio, and that the matter be referred to his committee with instructions to prepare definite proposals to carry out the plan for presentation at the annual meeting. The motion carried.

The following addresses were made during the course of this unusually successful meeting. "Problems of the Lawyer in Matters before the Division of Securities," by Hon. Anthony W. Geisinger, Chief of the Division; "Problems of the Lawyer in Matters before the Public Utilities Commission," by Judge Frank W. Geiger, Chairman of the Commission; "The Problems of the Lawyer in the Trial of a Case," by Hon. Luther Day, of Cleveland; "Problems of the Lawyer in Matters before the Industrial Commission," by Hon. Thomas M. Gregory, a member of the Commission; "Problems of the Lawyer Relating to the Johns Hopkins Institute Survey," by Chief Justice Carrington T. Marshall. The Gridiron Dinner and Dance, at which Mr. George F. Holland of Dayton, presided as master of ceremonies, and the annual banquet, at which Hon. Daniel W. Iddings, Past President of the State Bar Association, presided, were both highly enjoyable affairs. At the latter delightfully humorous addresses were made by Hon. Murray Seasongood, former Mayor of Cincinnati, and by Hon. Roland W. Baggott, of Dayton.

## Miscellaneous

At the annual meeting of the Winnebago County Bar Association, which was held at the Court House at Rockford, Illinois, on Monday, January 13, 1930, the following officers were elected for the present year: President, David D. Madden; Vice President, Charles H. Linscott; Secretary, John R. Snively; Treasurer, Eldred E. Fell. The new President is Corporation Counsel of the City of Rockford and was Vice President of the Association last year. Mr. Linscott served in the office of the Attorney General of the State of Illinois under Patrick J. Lucey and is a member of the law firm of North, Linscott, Gibboney, North & Dixon. Mr. Snively and Mr. Fell are serving their third term in their respective offices. The retiring President was B. A. Knight. Under his direction the Association had the most active and successful year during its long existence.

The Eighteenth District (Minn.) Bar Association met on October 5th, 1929, for their annual convention and banquet. The following officers were elected for the ensuing year: George Tyler, of Elk River, president; Henry Soderquist of Cambridge, vice-president; E. J. Jorgenson of Anoka, secretary; F. H. Lindsey of Delano, treasurer. Raymond Hastings of Elk River and Thomas Welch of Buffalo were elected on the Board of Governors.

Harvey J. Curtis was unanimously elected president of the Gary (Ind.) Bar Association, at a meeting of that organization in November. Other officers chosen were as follows: Homer Sackett, vice-president; A. C. Pendleton, secretary, and T. J. Hurley, treasurer.

The Tate County (Miss.) Bar Association was recently organized and J. F.

Dean elected president and Harper Johnson, secretary.

Organization of the Bar Association of the Eleventh Judicial District (Mo.) was completed in November. James F. Ball of Montgomery was selected as president, R. D. Rodgers of Mexico, vice-president; Glover Dowell of Montgomery, secretary, and Joe Bone, Jr., of Mexico, treasurer.

The Madison County (Ill.) Bar Association held its annual meeting on October 31 and the following officers were elected: Thomas Williamson, Edwardsville, president; William P. Boynton, Alton, vice-president; E. L. Maher, Granite City, treasurer. Miss M. Esther Funke was elected secretary.

The annual election of officers of the Pueblo (Colo.) Bar Association was held in November, with Miles G. Saunders elected president for the ensuing year; Todd C. Storer was elected vice-president, and O. G. Pope was reelected secretary-treasurer.

C. Walter Randall of Garden City was chosen president of the Nassau County (N. Y.) Bar Association at the annual meeting of that body recently held. Other officers chosen are as follows: Vice-presidents, Thomas R. Fay, Port Washington; James N. Gehrig, Hempstead, and Daniel Underhill, Jericho. O. Edward Payne, Glen Cove, was re-elected treasurer, and Theodore N. Ripson, Garden City, was re-elected secretary.

At the annual meeting and banquet of the Otter Tail County (Minn.) Bar Association, held December 3rd, the following officers were elected for the coming year: President, Cyrus Field, Fergus Falls; vice-president, W. P. Berghuis, Fergus Falls; secretary and treasurer, M. J. Daly, Jr., Perham.

The Fort Worth and Tarrant County (Tex.) Bar Association held its annual election of officers in October. Officers chosen were as follows: Hugh B. Smith, president; W. Erskin Williams, first vice-president; R. B. Young, Jr., second vice-president; Dexter Scurlock, third vice-president; R. B. Stone, Jr., secretary-treasurer. The following board of directors was re-elected: Walter B. Scott, Ernest May, Glenn Smith and Frank J. Warren.

Matt J. Harbeson was elected the 30th president of the Kenton County (Ky.)

Bar Association at that organization's annual banquet on December 4th. Other officers chosen were: Elmer Ware, vice-president; Douglas Curry, secretary, and Shelley D. Rouse and Robert C. Simmons, members of the executive committee.

The Williamson County (Ill.) Bar Association held its annual meeting in December, and the following were chosen as officers for the ensuing year: President, Judge R. T. Cook; vice-president, Hosea V. Ferrell; secretary, Snyder Herrin; treasurer, William E. Myers.

At the recent annual meeting of the Indianapolis Bar Association William L. Taylor was named president of the organization. Other officers chosen for the coming year were as follows: Howard S. Young, first vice-president; Earl R. Cox, second vice-president; Donald S. Morris, treasurer; Eph Inman and Clarence W. Means, members of the executive committee.

Russell Keyes was elected president of the Cole County (Mo.) Bar Association at the annual meeting and banquet of that organization in December. James Potter was named vice-president and H. P. Lauf, secretary. Tom H. Antrobus was re-elected treasurer.

The St. Joseph County (Ind.) Bar Association for the next year will be headed by John W. Schindler, unanimously elected president of the organization at a recent meeting.

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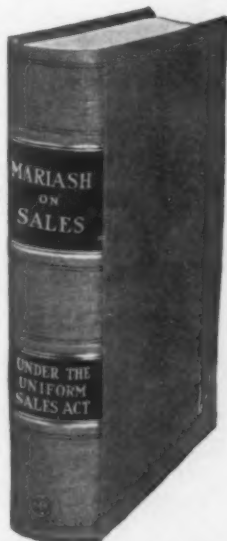


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